IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

THE TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY, THE RHODE ISLAND LOCOMOTIVE WORKS, THE RHODE ISLAND NATIONAL BANK, THE BUILDING & CONTRACTING COMPANY OF KENTUCKY, JULES S. BACHE, FERDINAND E. CANDA and S. H. KNEELAND, Petitioners,

vs.

THE CONTINENTAL TRUST COMPANY OF NEW YORK, Surviving Trustee, CHARLES HAMLIN, ELLEN V. HAMLIN, HANNIBAL E HAMLIN, FRANK HAMLIN, SIGNAL OIL WORKS, Limited, AND CHARLES MILLER, Respondents.

Petition for a Writ of Certiorari.

To

Messrs. CARY & WHITRIDGE,

Solicitors for the above named Respondent The Continental Trust Company of New York, Surviving Trustee,

and to

Messrs. RICHARDS & BROWN,

Solicitors for the above named Respondents Hamlins:

You and each of you are hereby notified that the petition for a writ of certiorari, a copy of which, with the exhibits annexed thereto, is hereto attached and herewith served upon you, will be brought on for hearing before the Supreme Court of the United States at Washington, D. C., on Monday, the 22nd day of January, 1900, at the opening of Court on said day, or as soon thereafter as counsel can be heard.

You can appear and oppose the same if you think proper.

Dated January 12th, 1900.

JAMES D. SPRINGER,
F. SPIEGELBERG,
JOHN FORD,
Attorneys for the above named Petitioners.

17879

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY, THE RHODE ISLAND NATIONAL BANK, THE RHODE ISLAND LOCOMOTIVE WORKS, THE BUILDING & CONTRACTING COMPANY OF KENTUCKY, JULES S. BACHE, FERDINAND E. CANDA, SYLVESTER H. KNEELAND, Petitioners,

vs.

THE CONTINENTAL TRUST COMPANY OF NEW YORK, Surviving Trustee, CHARLES HAMLIN, ELLEN V. HAMLIN, HANNIBAL E. HAMLIN, FRANK HAMLIN, SIGNAL OIL WORKS (Limited), CHARLES MILLER, Respondents.

PETITION FOR WRIT OF CERTIORARI.

JAMES D. SPRINGER
F. SPIEGELBERG and
JOHN FORD,
Attorneys for Petitioners.

17880

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

THE TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY, THE RHODE ISLAND NATIONAL BANK, THE RHODE ISLAND LOCOMOTIVE WORKS, THE BUILDING AND CONTRACTING COMPANY OF KENTUCKY, JULES S. BACHE, FERDINAND E. CANDA, SYLVESTER H. KNEELAND, Petitioners,

vs.

THE CONTINENTAL TRUST COMPANY OF NEW YORK, Surviving Trustee; CHARLES HAMLIN, ELLEN V. HAMLIN, HANNIBAL E. HAMLIN and FRANK HAMLIN, SIGNAL OIL WORKS (Limited) and CHARLES MILLER, Respondents.

To the Honorable the Supreme Court of the United States:

The above named petitioners respectfully represent unto this honorable court:

1. That on the 18th day of May, 1893, Joseph S. Stout and Randolph F. Purdy instituted a general creditors' suit against the Toledo, St. Louis & Kansas City Railroad Company, in the Circuit Court of the United States for the Northern District of Ohio, Western Division, setting forth in their bill therein facts showing the requisite diverse citizenship of the parties to said suit; that the complainants were existing creditors of the said defendant; that the amount of their claims against the said defendant exceeded the sum of $5,000; that their claims against the said defendant had been reduced to judgment in the Court of Common Pleas of Lucas County, Ohio; that execution had been issued thereon and returned *nulla bona;* that the said defendant had no property anywhere subject to execution or other legal process; that the said defendant was the owner of and in possession of and operating a continuous line of railway extending from the city of Toledo, in the State of Ohio, through the States of Ohio, Indiana and Illinois, to the city of East St. Louis, in the last State, a distance of 450 miles, together with all its appurtenant property and equipment; that the said defendant was then insolvent; that said railway was

largely incumbered and the said defendant otherwise largely indebted; that there was great danger that the indebtedness of said defendant would be reduced to judgment and executions issued thereon and said railway and appurtenant property sold in parcels or in detached portions, and thereby the chief value of such railway, which consisted in the unity of ownership and operation of the same, destroyed, but that if such unity were preserved, and the said railway and appurtenant property and equipment sold as an entirety, sufficient would be realized from the sale to pay off all the liabilities, secured and unsecured, of the said defendant; and praying that the property and assets of the said defendant be marshaled, and the amount and rank of its liabilities settled and determined, and to that end that a receiver of all the property and income of the said defendant be appointed; all of which will more fully appear by reference to said bill, a copy of which is set out on pages 2 to 14, both inclusive, of Volume 1 of the transcript from the Circuit Court of Appeals of the United States for the Sixth Circuit, hereinafter referred to

2. That on the said 18th day of May, 1893, the complainants in said suit, by their counsel, presented to the said Circuit Court their application for the appointment of a receiver in said suit, as prayed in said bill, due notice of which was given to the said defendant, which appeared upon the hearing of said application by Robert G. Ingersoll, its counsel, and thereupon the court made and entered an order appointing Samuel R. Callaway, of Toledo, Ohio, receiver of said defendant, and of all its property, real, personal and mixed, wherever situated, and authorized and empowered him to take possession of and operate the said railway, and to sue in his own name and recover all the money, property or assets of said defendant, and to retain and employ all necessary agents, laborers, servants and attorneys, and to fix and alter the compensation of such necessary agents, laborers, servants and attorneys, for the due administration of his trust and the performance of the duties imposed upon him by such order, subject to the supervision of the court; all of which will more fully appear by reference to said ordear, a copy of which is set forth on pages 15 to 19, both inclusive, of said volume 1 of said transcript.

3. That on the 19th day of May, A. D. 1893, the said receiver duly qualified, pursuant to his said appointment, and thereupon ook possession of the said railway, its appurtenant property and equipment, and all other money, property and income of the said defendant, and thenceforth continued and was in the possession of the same at the time of the institution of the foreclosure proceedings hereinafter mentioned: all of which will more fully appear by reference to pages 19 to 65, both inclusive, of said volume 1 of said transcript.

4. That on the 18th day of November, A. D. 1893, John C. Havemeyer and others presented to the said Circuit Court, in said

suit, their petition, setting forth the execution and delivery of the mortgage and the bonds by the defendant, hereinafter mentioned, and that they were a committee appointed by the holders of nearly all of said bonds to represent them and protect their interests with respect thereto in said suit, and praying that they might be permitted to intervene and be made parties thereto to that end; in pursuance of which petition the said Circuit Court, on the same day, made an order granting the prayer thereof: all of which will more fully appear by reference to said petition and order, a copy of which is set forth on pages 20 to 27, both inclusive, of said volume 1 of said transcript.

5. That all the foregoing proceedings were and are entitled Joseph S. Stout and Randolph F. Purdy, complainants, vs. The Toledo, St. Louis & Kansas City Railroad Company, defendant, No. 1155 Chancery.

6. That on the 13th day of December, 1893, the Continental Trust Company, of the City of New York, and John M. Butler presented to the said Circuit Court a petition setting forth that the said defendant was then a corporation duly created and existing under the laws of the States of Ohio, Indiana and Illinois: that on the 19th day of June, 1886, said defendant made and executed to the American Loan & Trust Company, a corporation created by and existing under the laws of the State of New York, and Joseph E. McDonald of the City of Indianapolis, in the State of Indiana, in order to secure an issue of its 9800 first mortgage bonds of $1000 each, bearing date the 1st day of June, 1886, and payable on the 1st day of June, 1916, in the City of New York, with interest thereon from the said date thereof at the rate of six per cent. per annum, payable semi-annually on the 1st days of June and December in each year, in accordance with the tenor of the coupons thereunto annexed, its certain indenture of mortgage or deed of trust, granting unto the said trustees its line of railroad, commencing at the city of Toledo, in the State of Ohio, and extending thence through the States of Ohio and Indiana into and through the State of Illinois to the city of East St. Louis, in said State of Illinois, and all its other property and franchises acquired and to be acquired in said indenture of mortgage particularly described; that said railroad company thereafter issued its first mortgage bonds to the amount of $9,000,000, to-wit, 9,000 bonds of $1,000 each, and the same are now outstanding in the name of *bona fide* holders and owners for value, and are a first lien upon the property of said railroad company in said indenture of mortgage described and, since the execution thereof, acquired by said railroad company.

Said petition further set fourth the said proceedings in the said general creditors' suit, the appointment and qualification of said receiver and his possession of said property; that said railroad company had made default in the payment of interest on its said

first mortgage bonds which became due on the 1st day of June 1893; that said Joseph E. McDonald, one of the trustees originally named in said mortgage, died after the execution and delivery thereof, and said American Loan and Trust Company, the other trustee, became insolvent, and was, by the laws of the State of New York, dissolved; that the petitioners are now the trustees under said first mortgage, having been duly appointed as such trustees under the powers by such first mortgage conferred, and are vested with all the estates, trusts, powers and duties of the trustees originally named therein.

That in pursuance of the powers by said indenture of mortgage or deed of trust conferred, a majority of the holders of said bonds have elected and declared the whole of said bonds outstanding under said first mortgage, together with the interest thereon, to be forthwith due and payable, and have requested the petitioners, under the powers in that behalf in said indenture of mortgage contained, to take possession of and sell the property of said railroad company embraced in said indenture of mortgage of deed of trust, or, instead of taking proceedings for and making sale of said premises, estates, franchises, privileges and property in virtue of the power of sale in said indenture of mortgage contained, to proceed by bill in equity, or other appropriate proceedings, to foreclose said mortgage, and to enforce the rights and securities of the trustees and the bondholders thereunder.

That the petitioners are about to file in this court a bill for the foreclosure of said first mortgage, and desire to make the said Samuel R. Callaway, who, as receiver as aforesaid, is now in possession of said property embraced in said first mortgage, a party thereto.

That the said petition then prayed that by an order of said Circuit Court the said petitioners may be permitted to make the said Samuel R. Callaway a party to said bill of foreclosure, to be filed by them, and that they may have such other and further relief as may be just:

All of which will more fully appear by reference to said petition, a copy of which is set forth on pages 28 to 31, both inclusive, of said Volume 1 of said transcript.

7. That afterwards, and on the said 13th day of December, 1893, the court made and entered an order in said petition granting the prayer thereof. All of which will more fully appear by reference to said order, a copy of which is set forth on page 32 of said volume 1 of said transcript.

8. That on the said 13th day of December, A. D. 1893, the said Continental Trust Company and the said John M. Butler filed in said Circuit Court a bill in equity, setting forth the following, among other things, to-wit.:

(1) That the said Continental Trust Company was and is a corporation duly organized and existing under the laws of the State

of New York, and then was a citizen of that State; that the said John M. Butler then was a citizen of said State of Indiana; that Samuel R. Callaway, receiver as aforesaid, was then a citizen of said State of Ohio; that said Joseph S. Stout, Randolph F. Purdy, Ferdinand E. Canda, Charles T. Harbeck, Jules S. Bache and Oliver Adams were then each citizens of the State of New York; that the Oliver & Roberts Wire Company was then a corporation duly organized and existing under the laws of the State of Ohio, and was then a citizen of that State; that George B. Cass was then likewise a citizen of the State of Ohio; that the defendant, the Toledo, St. Louis & Kansas City Railroad Company was a corporation duly organized and existing by the consolidation of corporations of the States of Ohio, Indiana and Illinois, and was then a citizen of each one of said States.

(2) The execution by the said defendant railroad company of the bonds and mortgage or deed of trust described in the said petition of the said Continental Trust Company and John M. Butler, and the ownership by said railroad company of the railway and appurtenant property and equipment and other property mentioned and described in said mortgage or deed of trust.

(3) The precipitation of maturity of the principal of said bonds, as set forth in said petition.

(4) The ownership of said bonds and coupons as set forth in said petition.

(5) The proceedings taken in said general creditors' suit aforesaid, including the appointment and qualification of the said receiver and his possession thereunder of said railway, its appurtenant property and equipment.

(6) The insolvency of the said defendant railroad company, its inability to pay and discharge its debts and liabilities.

(7) That the following named persons have or claim to have some interest in said mortgaged property, as owner, lessee, mortgagee or otherwise, which interest, if any, has accrued or is subsequent to the lien of said first mortgage, to-wit: The Toledo, St. Louis & Kansas City Railroad Company, Samuel R. Calloway, as receiver of said railroad company, Joseph S. Stout, Randolph F. Purdy, Ferdinand E. Canda, Charles T. Harbeck, Jules S. Bache, Oliver & Roberts Wire Company, George B. Cass and Oliver Adams.

That said bill then prayed the foreclosure of said mortgage or deed of trust, and the sale of the said mortgaged property, and that the proceeds of sale be applied to the payment of costs, counsel fees, charges and expenses in such foreclosure suit, and in the execution of the trust secured by said mortgage or deed of trust, and reasonable compensation for the performance of said trust, and the residue to the payment of the principal and interest remaining unpaid upon said bonds and coupons; that the said defendant railroad company may be adjudged to pay any deficiency after so applying the proceeds of said sale; that pending

such foreclosure suit a receiver or receivers be appointed, with the usual powers of receivers in like cases, of all and singular the mortgaged property and premises, and the rights, privileges and immunities connected therewith, and of the rolling stock, machinery, equipment and other property incident to the same; that such receiver or receivers be authorized and directed to maintain and operate the said railroad, and to keep the same in proper repair, and to receive, collect and preserve all the property, assets and income thereof; and that such directions may be made with respect to such receivership as may be equitable and proper, and for such other and further relief as may be just and equitable.

That a writ or writs of subpœna be issued by the court, directed to the said respondents, the Toledo, St. Louis & Kansas City Railroad Company, Samuel R. Callaway as its receiver, and the said Joseph S. Stout, Randolph F. Purdy, Ferdinand E. Canda, Charles T. Harbeck, Jules S. Bache, Oliver & Roberts Wire Company, George B. Cass and Oliver Adams, commanding them and each of them, at a certain time and under a certain penalty, to be named, to be and appear before said Circuit Court, then and there severally to answer all and singular the matters set forth in said bill.

All of which will more fully appear by reference to said bill, a copy of which is set forth on pages 32 to 60, both inclusive, of said volume 1 of said transcript.

9. That afterwards and on the said 13th day of December, 1893, the court made and entered an order on said bill, appointing the said Samuel R. Callaway as receiver under said bill of the said Toledo, St. Louis & Kansas City Railroad Company, and of all its property, real, personal and mixed, of every description and wherever situate, described in said bill of complaint, with all the powers and duties usual to receivers in such cases.

That said receiver be authorized, empowered and instructed to enter upon and take possession of the said railroad, and all the equipment, machinery and all the real and personal property, moneys, rights, credits, effects and assets of said respondent railroad company, of every description whatsoever and wheresoever found, and to manage and operate said railroad as an entirety, and to manage and control all said property and effects of said railroad company, and preserve and protect the same, and to execute all the franchises, powers, rights and privileges whatsoever of said company, acting in all things under the orders and directions of this court; and otherwise prescribing that said railroad, appurtenant property and equipment, and the income thereof, be received, had and held by the receiver so appointed for the use and benefit of said bondholders and the trustee, complainants in said foreclosure suit.

All of which will more fully appear by reference to said order, a copy of which is set forth on pages 61 to 63, both inclusive of volume 1 of said transcript.

10. That afterwards, and on the said 13th day of December,

1893, the court made and entered an order in said foreclosure suit, consolidating the same and said general creditors' suit under the title of said foreclosure suit, and extending the receivership established in said general creditors' suit over the said foreclosure suit: all of which will more fully appear on pages 64 and 65 of volume 1 of said transcript.

11. That all the pleadings, orders and proceedings aforesaid in said foreclosure suit were entitled *Continental Trust Company of the city of New York and John M. Butler, complainants, vs. The Toledo, St. Louis & Kansas City R. R. Co., et al., respondents*, and numbered 1205 Equity, on the files and records of said court.

12. That on the said 13th day of December, 1893, the said Circuit Court made and entered in said general creditors' suit an order consolidating the same with the said foreclosure suit under the name and title of the latter: all of which will more fully appear from pages 27 and 28 of said volume 1 of said transcript.

13. That the several parties defendant to the said foreclosure suit filed answers thereto, setting up various defenses, to which replications were filed by the said complainants in the foreclosure suit: all of which will more fully appear by reference thereto on pages 65 to 91, both inclusive, of said volume 1 of said transcript.

14. That afterwards, and on or about the 15th day of October, 1895, Charles Hamlin and others filed in said consolidated suit an answer and cross-bill to the said foreclosure bill, setting up that they were severally the owners and holders of a large amount of preferred stock issued by said defendant railroad company; that the same was a valid and subsisting lien upon said railway, its appurtenent property and equipment, subject and subordinate only to the said first mortgage; that said bonds and all of them had been issued by said defendant railroad company, together with $11,250,000 of its common stock, to one Sylvester H. Kneeland, in payment for improving, bettering and equipping said railroad and discharging certain paramount liens thereon; that he had failed to carry out his agreements to do so, and that there was a partial failure of consideration for said bonds; and praying that the enforcement of said bonds and mortgage be restricted to the proportion of the consideration therefor actually received by the said defendant railroad company, and that such preferred stock be decreed to be a lien upon the said railway, its appurtenant property and equipment and the income thereof, prior, superior and paramount to all other liens thereon or claims against said company, save only such amounts as should be found due from the defendant railroad company on said bonds, and for other relief.

15. That said answer and cross-bill were subsequently stricken from the files by the said Circuit Court, but that afterwards, upon the appeal of the said Hamlins to the Circuit Court of Appeals of the United States for the Sixth Circuit, the said order was reversed and the said answer and cross-bill reinstated.

That thereafter the said complainants in said foreclosure suit filed replication to said answer and an answer to the said cross-bill, and the said Hamlins filed replication to said last-named answer.

That at a later date one Sylvester H. Kneeland was made, of his own motion, a defendant to said cross-bill and filed an answer thereto, as did the said defendant railroad company, neither of whom had before been made parties to or in any wise appeared to said cross-bill.

That said last-mentioned answers denied the validity of the preference asserted by the said Hamlins in said answer and cross-bill, and furthermo e alleged that the preferred stock owned or represented by them in said answer and cross-bill to the extent of $415,000 in par value was and is unauthorized, illegal and void; that replications were filed to said answers.

That all the foregoing will appear by reference to pages 90, 92, 96, 106, 133, 342, 344, 452, 456, 528, 609 and 623, Vol. I., Transcript and page 3,862, Vol. II, Transcript.

16. That on the 9th day of September, 1896, the Signal Oil Works, Limited filed, in said consolidated suit a petition, setting forth that it was a corporation duly organized and existing under the laws of the State of Pennsylvania; that the defendant railroad company was indebted to it in the sum of $2,825.85, with 6 per cent. per annum interest, for lubricating and illuminating oils furnished by it for use, and used, upon the said railway in the year 1892, in the maintenance and operation thereof; that on the 30th day of December, 1885, the said railway, which was then of narrow gauge, was sold at foreclosure under certain decrees rendered by the Circuit Court of the United States for the District of Indiana on the 12th day of November, 1885, foreclosing certain mortgages thereon—that part extending from Toledo, Ohio, to Kokomo, Indiana, for $600,000, and that part extending from Kokomo, Indiana, to the city of East St. Louis for $901,000 to the said S. H. Kneeland, under an agreement between the said S. H. Kneeland and the holders of the bonds secured by the mortgages foreclosed by said last mentioned decrees that he would advance the moneys required by said decrees to make the preliminary payments, and would hold the same in trust for the holders of such bonds, to be conveyed to them, or as they should direct, upon being reimbursed for such payments, with reasonable compensation for his time and trouble and indemnification against his liabilities in making such purchase.

That thereafter, and on the 23rd day of January, 1886, the said bondholders, acting by their several committees, consisting of James M. Quigley and others, and the said S. H. Kneeland, entered into agreements by which the said Kneeland agreed to complete the payment of his said bids in the manner hereinafter mentioned; that he would procure three corporations to be organized, one under the laws of Ohio, another under the laws of Indiana, and a third under the laws of Illinois, and that he would convey to them

severally those portions of said railway situated within the states under whose laws they should be severally organized as aforesaid; that he would procure said corporations to be consolidated into one single corporation; that such consolidated company should widen said railway to a standard gauge and relay the same with steel rails of not less than 60 pounds to the yard in the main line, widen all embankments and cuts to the requisite width, widen, strengthen and rebuild bridges as the same may be necessary, construct all necessary stations, tanks, houses, repair shops and sidings, so that the said railroad reaching from Toledo, Ohio, to East St. Louis, Illinois, shall be in all respects a first-class road of standard gauge; that such consolidated company shall equip said road with all necessary cars of every description, and with the requisite motive power, and that it will use the proceeds of at least four of said first mortgage bonds per mile of road in the purchase of said equipment.

That the parties to said last mentioned agreement further mutually agreed that the consolidated company should issue its said bonds to the amount of $20,000 per mile of line owned by it; that it should likewise issue its coupon, non-voting, convertible stock, prepared for registry to a name or to bearer, in shares of $100 each, to the amount of $5,805,000, having coupons attached payable semi-annually, at the rate of 4 per cent. if earned in whole, or in part to the extent earned, and covering ten years from January 1, 1888, viz: twenty coupons, and that whenever the net earnings of the road for the period covering a coupon are not sufficient to pay the same, then the holders of such coupons shall surrender them, on receiving their pro rata share of such net earnings as there shall be for that period; that such coupon convertible stock be convertible after five years from date of issue, at the pleasure of the holder, into common stock of the company, and if not converted whitin ten years from date of issue to be a preferred 4 per cent. non-cumulative, non-voting stock; that $4,805,000 of said issue be used and disposed of as follows, to-wit: To the holders of the bonds secured by the said foreclosed mortgage on that part of said line extending from Toledo, Ohio, to Kokomo, Indiana, 15 shares of such preferred stock for each $1,000 first mortgage bond turned over to the said Sylvester H. Kneeland; and to the holders of the bonds secured by the mortgage foreclosed on that part of said line extending from Kokomo, Indiana, to East St. Louis, Illinois, 10 shares of such coupon stock for each of such bonds, and that the remaining $1,000,000 of such preferred stock should be issued to two trustees, for delivery to the said S. H. Kneeland for use in compromising, adjusting and settling claims and suits now existing and pending, or suits that may be hereafter brought against the said lines or the consolidated company, payable out of the proceeds of said sale under said decrees as provided in such decrees, and that such amount of said stock shall be issued by said trustees to the said S. H. Kneeland upon his furnishing vouchers to them showing for what pur-

poses or claims said stock has been or is to be used, and any balance of such stock undisposed of for said purposes, if any, shall be subject to the order of the said consolidated company; that the common stock of said company should be $25,000 per mile of main line, divided into shares of the par value of $100 each, and that no other bonds or coupon stocks shall be issued for any purpose than as aforesaid, except for the acquiring of additional road, and then only with the consent of a two-thirds vote of the coupon stock present at a meeting called for the purpose, after due notice.

That of the bonds so to be issued as aforesaid, the said bonds and common stock of the said consolidated company should be delivered to two trustees, one to be selected by the said bondholders and the other by the said S. H. Kneeland; that such common stock and bonds should be issued by such trustees to the said S. H. Kneeland as follows: Two thousand of said bonds and 25,000 shares of said common stock as soon as the same should be issued to the said trustees; that the remaining 7,000 of said bonds should be delivered to the said S. H. Kneeland as fast as rolling stock is placed upon said line, to the amount of the value of such rolling stock, and as fast as said work of completing said road structures and appliances progresses under and in accordance with such agreement the said trustees shall deliver to the said Kneeland said first mortgage bonds and stock to the value, under this contract of such work done or material furnished, the value thereof to be certified in writing by the chief engineer of the said consolidated road, and that the said common stock should be issued and delivered to the said S. H. Kneeland upon the same conditions and for the same considerations that the said first mortgage bonds are to be delivered as aforesaid.

That the bonds to be delivered to the said S. H. Kneeland in exchange for the said $4,805,000 of preferred stock as aforesaid, should be used by him in paying so much of the purchase price for said line of railway bid by him as aforesaid as, under the said decrees of foreclosure, would have been distributable in cash to the holders of said bonds, if they did not exchange the same for such preferred stock.

That afterwards, and in the early part of the year 1886, the said S. H. Kneeland procured a corporation to be organized under the laws of the State of Ohio, with the corporate name and style of the Toledo, Dupont and Western Railway Company, another under the laws of Indiana, with the corporate name of the Bluffton, Kokomo and Southwestern Railroad Company, and a third under the laws of Illinois, with the corporate name and style of the Toledo, Charleston and St. Louis Railroad Company, and thereupon conveyed to each severally the portions of said line of railway situated within the States of their creation respectively, with the property appurtenance thereto and the equipment thereof; and on or about the 12th day of June, 1886, procured such companies to enter into an agreement for the consolidation of their stock prop-

erty and franchises under the corporate name and style of the Toledo, St. Louis and Kansas City Railroad Company, the defendant hereinbefore referred to, and such agreement to be recorded as required by the laws of the said States of Ohio, Indiana and Illinois; which articles of consolidation provided for the issue by the said consolidated company of the stock and bonds provided for in the said agreement of January 23, 1886; that the parties to the said agreement of January 23, 1886, appointed the said Kneeland, Robert G. Ingersoll, who was his attorney, and the other parties, Isaac W. White, and thereupon the said consolidated company, which had in the meantime elected the said James M. Quigley and the said Isaac W. White directors thereof, and the said Quigley president, and the said Isaac W. White secretary, issued and delivered to the said James M. Quigley, who was the chairman of the bondholders' committees mentioned in the said agreement of January 23, 1886, the $4,805,000 of preferred stock for exchange for the bonds secured by the foreclosed mortgages, as provided in said last mentioned agreement, and to the said trustees Ingersoll and White all of said 9,000 bonds and all of the $11,250,000 of common stock, and all of the said $1,000,000 of preferred stock deliverable to Kneeland under the provisions of said last mentioned agreement, which trustees from time to time issued and delivered to the said S. H. Kneeland all of such 9,000 bonds, all of such $1,000,000 in par value preferred stock, and all of said $11,250,000 in par value common stock.

That at the time of the execution and delivery of said agreements of January 23, 1886, as well as at all times since that date, the actual cost of performing the stipulations of said agreements, to be done and performed by the said Kneeland thereunder, including the payment of the total amount by him bid for said line at said judicial sale, would not and has not exceeded the sum of $5,000,000.

That the aggregate amount of all expenditures made and incurred by the said Kneeland, in performing the stipulations of the said agreements of January 23, 1886, to be done and performed by him thereunder, including the payments of the full amounts bid by him for said property at said judicial sale, has not exceeded $5,000,000.

That the value of said agreements of January, 23, 1886, to the said three constituent companies, or to the said new or consolidated company, has at no time exceeded $5,000,000.

That the value to the said three constituent companies and to the new or consolidated company of all things done or to be done by the said Kneeland in performing the stipulations of said agreement of January 23, 1886, to be done and performed by him, has at no time exceeded $5,000,000 in the aggregate.

That the aggregate value of the property conveyed to the said three constituent companies by the said Kneeland as aforesaid did not, at the time of the making of said agreements of January 23, 1886, nor at the time of the making of said conveyances, nor at

the time of the said consolidation, nor for several years thereafter, exceed the sum of $1,501,000, nor at the same times did that part situated in the State of Ohio exceed in value $425,000, nor that part situated in the State of Indiana $526,000, nor that part situated in the State of Illinois $550,000.

That of the amount paid for said property at such judicial sale by said Kneeland as aforesaid, not less than $1,200,000 thereof was distributable in the payment of liens and claims duly adjudicated to be prior, superior and paramount to those of the holders of the bonds secured by the mortgages foreclosed as aforesaid, so that their total aggregate interest or equity, or that of their assigns, in the entire property purchased by said Kneeland at such judicial sale, at the time of such purchase, when they received the said shares of preferred stock as aforesaid, nor until long afterwards did not exceed $300,000.

That the obligors of the bonds secured by the mortgages foreclosed as aforesaid were at all the times aforesaid utterly insolvent, and the said bonds entirely worthless, except so far as the holders thereof were interested in the said contracts of January 23, 1886, or the proceeds of the sale to the said S. H. Kneeland as aforesaid.

That the parties to the said agreements of January 23, 1886, at the time of making the same, and at all times since the said three constituent companies, their stockholders, directors and officers at the time of issuing and delivering their stock to the said Kneeland as aforesaid and at all times since; the defendant railroad company, its stockholders, directors and officers at the time of the alleged creation of the said defendant railroad company and at all times since, each and all well knew each and all the averments, matters and things stated and set forth in said petition as aforesaid to be true.

That it was well known and understood by and between the parties to the said agreements of January 23, 1886, at the time of the making of the same and at all times since, that the actual cost of performing the stipulations of said agreements, to be done and performed by the said Kneeland, the payment by the said Kneeland, of the total amounts bid by him for the purchase of said property at said judicial sale, and the actual cost of paying and discharging all paramount liens upon said property, would not, and did not, exceed in the aggregate one-fifth part of the aggregate par value of the stock and bonds to be issued and delivered to the parties to the said agreements thereunder, nor one-fourth part of the aggregate par value of the stock and bonds to be issued and delivered, and which have been issued and delivered, to the said Kneeland under said agreements.

That said bonds were sold for less than 75 cents on the dollar, and that a large proportion of them were purchased by directors of the said defendant Railroad Company at less than par.

The said petition then set forth the proceedings in the said gen-

eral creditors' suit and the said foreclosure proceedings; that various persons claiming to be creditors of the said defendant railroad company have filed their intervening petitions in the consolidated suit and in the said suit of Stout & Company previous to the consolidation of the general creditors' suit and the foreclosure suit, setting up their claims, some of which are of a preferential and others of a non-preferential character, and that there are various other creditors having well founded claims against the defendant railroad company, some of which are of a preferentia and others of a non-preferential character.

That no action has been taken or orders made by the court or any of the parties to any of the said suits, limiting the time for the appearance of creditors or the presentation or proving of their claims against the said defendant railroad company or the said insolvent estate.

That no schedule of the assets or liabilities of the said defendant railroad company has been made or filed, nor action taken for ascertaining, determining or marshaling the assets or liabilities of the said defendant railroad company, nor have a y steps been taken for ascertaining or determining the relative rights, equities or priorities of the various creditors of the defendant railroad company.

The said petition then concluded with a prayer as follows: That the rights, equities and priorities of the several creditors of the defendant railroad company be ascertained, determined and settled by the decree of the court; that the amount due such petitioners from the said defendant railroad company may be fixed, ascertained and determined by the decree of the court; that the said alleged mortgage, which the said complainants are now seeking to foreclose, and all the said bonds of the defendant railroad company alleged to be issued thereunder and secured thereby be adjudged to be invalid, illegal and utterly null and void, and the holders thereof denied any and all right of participation in any distribution of proceeds of any sale of the rights, property or franchises of the said defendant railroad company; that a sale of all the rights, property and franchises of the said defendant railroad company may be ordered by the court, or of so much thereof as may be necessary to realize a sum sufficient to pay off and discharge all the claims, debts and liabilities of the defendant railroad company, with interest thereon and the costs in this suit; that the proceeds of such sale be ordered to be and be distributed amongst the several creditors of the said defendant railroad company according to their respective rights, equities and priorities, as the same shall be determined by the court, and the residue, if any, paid over to the said defendant railroad company; that the complainants and each of them, and all others who have heretofore in anywise become parties to this consolidated suit, or shall hereafter become such, may be required to answer this petition within a time to be fixed by the court, but not under oath (the oath being

expressly waived); that this petition be ordered to stand as an answer to the said bill of Stout & Company, and the bill of the complainants and in the consolidated suit, and as a bill or cross-bill against all who now are or shall hereafter become parties to the said consolidated suit; for the relief herein prayed; for general relief, and for the unusual writ of subpœna against all the parties to the said general creditors' suit and the said foreclosure suit, all of which will more fully appear by reference to said petition on pages 133 to 160, Vol. 1 of said transcript.

17. That at or about the time of the filing of said petition of the said Signal Oil Works (Limited), intervening petitions were filed in said consolidated suit by Rhode Island National Bank, Rhode Island Locomotive Works, F. E. Canda and Jules S. Bache, severally alleging:

(1) That the said S. H. Kneeland represented to them severally that the said Toledo, St. Louis & Kansas City Railroad Company was a corporation duly organized, and desired to borrow moneys from them to aid it in paying the interest upon said 9,000 bonds, and offered the notes of such pretended corporation therefor, payable to the order of himself and endorsed by him.

(2) That accordingly moneys were delivered by them to the said Kneeland, and used in paying interest on said bonds and notes of such pretended corporation given therefor, payable to the order of said Kneeland and by him endorsed and delivered to such petitioners severally, all of which said notes were then wholly unpaid and then amounted, principal and interest (*a*) those held by the said Bache to upwards of $130,000, (*b*) those held by F. E. Canda to upwards of $50,000, (*c*) those held by Rhode Island Locomotive Works to upwards of $20,000, (*d*) those held by Rhode Island National Bank to upwards of $12,000.

(3) The same facts as are set up in the said petition of the said Signal Oil Works (Limited), concerning the invalidity and nullity of said bonds under said Sections 3290 and 3313, Revised Statutes of Ohio.

(4) That the said Toledo, St. Louis & Kansas City Railroad Company was not a coporation *de jure* or *de facto*, (*a*) in that the Toledo, Charleston & St. Louis Railroad Company, one of the constituent corporations attempting to form said consolidation, was a corporation wholly of the State of Illinois, that such State did not adjoin the State of Ohio, and that the laws of Ohio then in force authorizing the consolidation of railroad corporations of that State with railroad corporations of other States, which was in the words and figures following, to-wit:

> "SECTION 3380. A corporation organized in this State for the purpose of constructing, owning and operating a line of railway, or whose line of road is made or is in the process of construction to the boundary line of a State, or to any point either in or out of the State, may consolidate its capital

stock with the capital stock of any company in an adjoining State organized for a like purpose, and whose line of road has been projected, constructed, or is in process of construction, to the same point, where the several roads so united and constructed will form a continuous line for the passage of cars; and roads running or to be constructed to the bank of a river which is not bridged, shall be held to be continuous under this section,"

did not authorize nor permit the consolidation in question; (*b*) and in that the laws of Illinois authorizing the consolidation of railroad corporations, in force at the time of the consolidation, and which were and are in the words and figures following, to-wit:

"Whenever any railroad which is situated partly in this State and partly in one or more other States, and theretofore owned by a corporation formed by consolidation of railroad corporations of this and other States, has been sold pursuant to the decree of any court or courts of competent jurisdiction, and the same has been purchased as an entirety, and is now or hereafter may be held in the name or as the property of two or more corporations incorporated respectively under the laws of two or more of the States in which said railroad is situated, it shall be lawful for the corporation so created in this State to consolidate its property, franchises and capital stock with the property franchises and capital stock of the corporation or corporations of such other State or States in which the remainder of such railroad is situated, and upon such terms as may be agreed upon between the directors and approved by the stockholders owning not less than two-thirds in amount of the capital stock of such corporations,"

did not authorize nor permit the consolidation in question, in that such entire line of railway was not previously owned by a consolidated company;

(5) That the said bonds, coupons and mortgage are null and void (*a*) because said Railroad Company, was neither a corporation *de jure* nor *de facto*; (*b*) because such bonds and cupons were sold by the Railroad Company, if a corporation, for less than 75 cents on the dollar, in violation of Section 3290, Revised Statutes of Ohio, which is in the words and figures following, to-wit:

"The directors of the Company may sell, negotiate, mortgage or pledge such bonds or notes, as well as any notes, bonds, script or certificates for the payment of money or property, which the Company may have theretofore received or shall hereafter receive as donations, or in payment of subscriptions to the capital stock, or for other dues of the Company, at such times and in such places, either within or without the State, and at such rates and for such prices, at not less than 75 cents on a dollar, as, in the opinion of the directors, will

best advance the interests of the Company; and if such notes or bonds are thus sold at a discount, without fraud, the seal shall be as valid in every respect, and the securities as binding for the respective amounts thereof, as if they were sold at their par value."

(*c*) because such bonds and coupons were purchased from the company, if it was a corporation, by directors thereof, at less than par, in violation of Section 3313, of the Revised Statutes of Ohio, which is in the words and figures following, to-wit:

"All capital stock, bonds, notes or other securities of a company purchased of the company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void."

(6) That said S. H. Kneeland had an equitable lien upon said railway, i s appurtenant property and equipment, for the expenditures made by him in discharging liens thereon, and for improving, bettering and equipping the same, and a claim therefor against the Ohio, Indiana and Illinois constituent companies severally to the extent to which they and the portions of said railway owned by them severally were benefitted by such expenditures; that said Kneeland was insolvent, was a non-resident of the state of Ohio, and beyond the jurisdiction of the courts therein; that no judgment was obtainable against him in person in that State; that he had no property in said State or elsewhere subject to execution or other legal process.

(7) That the said intervening petitions prayed that the interveners might be allowed to intervene and become and be made a party to the consolidated suit; that such petition may be ordered to stand as an answer to all the bills, cross-bills, intervening petitions and amended petitions now on file in such suit, as well as a bill or cross-bill for the following relief: (*a*) That the said articles of consolidation may be adjudged to be null and void, the said pretended corporation not to be now, and never to have been a corporation either *de jure* or *de facto*, and that all the said bonds, coupons, preferred and common stock and the said mortgage or deed of trust of the pretended corporation wholly null and void; (*b*) that the court inquire, and by its decree determine, what specific portions and parts of the real estate and personal property used in the maintenance and operation of the said railway belong to the said Kneeland; that the same be ordered sold and the proceeds applied to the payment of the costs of the proceedings of the petitioner and the other creditors of the said Kneeland, in subjecting the property of the said Kneeland to the payment of his debts, and to the payment ratably of the claims of the petitioner and the other creditors of said Kneeland; (*c*) that the court inquire, and by its decree determine, to what extent said railway and the different parts thereof belonging to the said Ohio, Indiana and Illinois corporations were respectively benefitted, improved and

bettered by the said expenditures of the said Kneeland, and to what extent each part was relieved by expenditures made by the said Kneeland in satisfying and discharging paramount liens thereon, and that such different parts of said railway, together with its appurtenances and equipment, be subjected to the payment of the amount so found; that the equipment of said line of railway be apportioned equitably and fairly between the different parts thereof owned by the said Ohio, Indiana and Illinois companies, and that the same be likewise subjected to the payment of the amount so found, and that the amount realized therefrom be applied ratably in payment of the said claims of the petitioner and other creditors of the said Kneeland; (*d*) that the said Ohio, Indiana and Illinois companies may be brought in and made parties to such petition; that the said S. H. Kneeland and J. M. Quigley and the said Isaac W. White be also brought in and made parties hereto; that the holders of the said preferred and common stock of the pretended corporation, as well as the holders of the outstanding bonds secured by the mortgages foreclosed as aforesaid, as well as the holders of the said paramount liens on the said railway, be brought in and made parties hereto by representation or otherwise; (*e*) that the right, equities and priorities of all parties having or claiming any interest in any of the property sought to be subjected to the payment of the debts of the said Kneeland, or out of which the said fund is to accrue, may be fully ascertained, determined and settled by the decree of this court.

The said petitions then further prayed that in the event that the relief embraced by the foregoing prayer should be denied, and the pretended corporation adjudged to be a corporation *de facto* or *de jure*; that then the claim of the petitioners against such pretended corporation be allowed and ordered to be paid out of proceeds of the sale of the property of such pretended corporation.

That the said bonds and coupons of the pretended corporation be adjudged to be illegal, null and void, together with the said mortgage or deed of trust under which it was claimed by the trustee the same were issued, and by which they allege the same are secured, and that the claim of the plaintiffs by virtue thereof be adjudged to be subordinate and subject to the claim of the petitioners for the payment of their said indebtedness against the said pretended corporation out of the proceeds of sale of the property of the latter.

That the rights, equities and priorities of all the parties to the consolidated suit, and all others having or claiming any lien upon or interest in said railway, its appurtenant property and equipment, be fully ascertained, determined and settled by the decree of the court.

That all who are now parties to the said consolidated suit, or who shall hereafter be made such, may be required to answer this petition within a time to be fixed by the court, but not under oath

(the oath being expressly waived), and for such other and further relief as a court of equity may properly afford.

The petitions then concluded with the usual prayer for a process against Sylvester H. Kneeland, James M. Quigley, Isaac H. White, The Toledo, Dupont & Western Railway Company, The Bluffton, Kokomo & Southwestern Railway Company, The Toledo, Charleston & St. Louis Railroad Company, Joseph S. Stout, Randolph F. Purdy, John C. Havemeyer, Herman O. Armour, James M. Hartshorn, Otto T. Bannard, Morton S. Paton, The Continental Trust Company of the City of New York, trustee, and John M. Butler, trustee, all of which will more fully appear by reference to pp. 234-236, pp. 188-237, pp. 160-187, pp. 292-341 and pp. 237-292, Vol. I., Transcript.

18. That afterwards motions were made by said intervening petitioners and by the railroad company:

(1) To dismiss the foreclosure bill for the want of jurisdiction in the lack of the required diverse citizenship of the parties.

(2) To set aside the order granting leave to make Receiver Callaway a party defendant to the bill of foreclosure, and the decree *pro confesso* against him.

(3) To set aside the orders consolidating the two causes.

(4) To set aside the order appointing a special Master to take and report the evidence, and to suppress the evidence already taken.

(5) A motion for a decretal order in the creditors' suit, referring the same to the standing or a special Master for proceedings in accordance with the chancery practice on general creditors' bills, fixing a time in which all creditors may present their claims to the Master, and a time when all parties in interest may file objections to the claims presented, and excluding from the benefit of the suit all creditors not presenting their claims to the Master within the time fixed; and a motion by the Continental Trust Company, trustee, to dismiss the said intervening petitions; upon which the court entered an order on the 15th day of October, 1897, denying all the motions of the said intervening petitioners, except that to set aside the order granting leave to make the said receiver, Callaway, a party defendant to the foreclosure bill and the decree *pro confesso* against him, which was granted and said order and decree set aside and vacated, and the suit dismissed as against such receiver; and except also the said motion of the said intervening petitioners for a decretal order of reference to a Master, which was sustained and an order entered appointing Irvin Belford special Master, and directing him to give forthwith thirty days' notice by advertisement to all creditors of the said railroad company, requiring them, on or before December 1, 1897, to file before him, under the said creditors' bill of Stout & Purdy, full and itemized statements of their respective claims against said company duly verified, and notifying all persons interested that all creditors failing

to comply with said notice, or to prove their claims within said time, will be excluded from any decree of distribution under said creditors' bill; and sustaining the said motion of the Continental Trust Company to strike, and striking from the files all the said intervening petitions, but granting leave to the petitioners to file within twenty days from the entry of such order, but only after the same shall have been presented to the court on notice to the complainant trustee mortgagee, and approved by the court as to the form thereof, a joint petition duly verified against individual holders of bonds issued under said first mortgage, against whom they can aver that the bonds held by such bondholders were purchased from said railroad company by a director thereof at less than the par value, and that such bonds are now held by such director, or by persons purchasing the same from such director, with knowledge of the fact of such original purchase at less than par, and that said petition be limited to the subject-matter aforesaid; which order the court afterwards modified and changed on the 23rd day of October, 1897, requiring such joint intervening petition to be filed within five days from the said 23rd day of October, 1897, and requiring the evidence on the part of the petitioner to be completed within thirty-five days from such 23rd day of October, 1897: all of which will more fully appear from the opinion of said court, and said orders, on pp. 458-493, Vol. 1 of Transcript.

19. That on the 28th day of October, 1897, the said petitioners, Signal Oil Works, limited, F. E. Canda, Jules S. Bache, Island National Bank, Rhode Island, Locomotive Rhode Works and the Building and Contracting Company of Kentucky, filed a joint intervening petition pursuant to said orders of October 15th and 23d, 1897, respectively, setting up their said respective claims as creditors of the said Toledo, St. Louis & Kansas City Railroad Company; that of the Building and Contracting Company of Kentucky amounting to upward of $60,000, for money loaned and used to pay interest on said bonds and evidenced by the notes of the company, payable to the order of the said Kneeland and endorsed and delivered by him to said Building and Contracting Company, and asserting the invalidity and nullity of said bonds, coupons and mortgage under said Sections 3290 and 3313, Revised Statutes of Ohio, the same as in the said petitions antecedently filed as aforesaid, to which the said Continental Trust Company filed its answer and the petitioners their replication, as will more fully appear by reference thereto on pages 494 and 528, volume 1 of transcript.

20. That the special Master published notice to creditors under said discretal order of reference, and claims were filed with him under said order by the said Bache, Berry Bros., M. M. Buck & Co., Leopold Cahn, the said Canda, George B. Cass, the Cincinnati, Jackson & Mackinac Railroad Company, the Dressel Railway

Lamp works, the said Charles T. Harbeck, Franklin Bank Note Company, W. Howard Gilder, Michigan Car Company, the said Charles Miller, Missouri Electric Light & Power Company, National Tube Works, Paragon Refining Company, Rhode Island Locomotive Works, Rhode Island National Bank, F. J. Sawyer, J. M. Sellers, Signal Oil Works, Stout & Company, George M. Thornton, Western Union Telegraph Company, Samuel K. Wilson, The Contracting and Building Company of Kentucky, the said S. H. Kneeland, The Continental Trust Company, Trustee, and a committee of the holders of said bonds, based upon said bonds, coupons and mortgage, the whole aggregating upwards of $16,000,000, the amount of the claim of said Charles Miller, being upwards of $5,000, based upon the promissory notes of the said company; the claim of the said Continental Trust Company, based upon said bonds, coupons and mortgage, being for $13,860,000; that of the said committee of bondholders, also based upon such of the said bonds, coupons and mortgage as they owned or represented, amounting to $10,544,810, and the claim of the said S. H. Kneeland, for extra expenditures, etc., amounting to $1,338,640.11: to which claims, based upon said bonds, coupons and mortgage, objections were filed with said Master in due time, and form, by each of said joint intervening petitioners, by the Railroad Company, and by Charles Miller and other creditors filing their claims with the Master as aforesaid, upon the ground that the same are null and void, as having been sold by the company for less than 75 cents on the dollar, in violation of said Section 3290, and on the ground that such bonds and coupons were purchased from the company by directors thereof at less than par, in violation of said Section 3313.

That afterwards, and on the 13th day of January, 1898, said special Master reported to the court the filing of said claims and the said objections thereto, but without any findings of fact or conclusions of law as to the merits, rank or amount of said claims or any of them, or said objections, and requested further instructions from the court, all of which will more fully appear by reference to the foregoing claims, objections and report at pp. 3710-3820, volume 2, transcript.

21. That evidence having, in the meantime, been taken and reported to the court, and filed in the clerk's office, upon the issues arising upon the said foreclosure bill, the answers thereto and the replications to such answers, the said joint intervening petition, the answer of the said trust company thereto, and the replication to such answer, the said cross-bill of Hamlins, the answers thereto and the replication to such answers, the consolidated suit was heard and submitted to the Circuit Court upon such issues and evidence on the 15th day of January, 1898, the following parties and no others appearing, to-wit: the Continental Trust Company, surviving trustee, complainant in the foreclosure proceedings; the

said joint intervening petitioners, Charles Miller, a creditor who came in solely by filing with the Master under said decretal order of reference his claim as a creditor of the company and his objections as such to said claims based upon said bonds, coupons and mortgage, the said S. H. Kneeland, the Hamlins, cross-complainants, and the railroad company.

22. That on the 1st day of April, 1898, the Circuit Court rendered a decree upon said foreclosure bill the answers thereto, the replication to such answers the Hamlin cross bill the answers thereto the replication to such answers, the joint intervening petition the answer thereto and the replication to such answer and the evidence adduced thereunder foreclosing said mortgage, and finding all the allegations of the foreclosure bill to be true, fixing the mortgage debt at the sum of $12,028,500., requiring the payment thereof within sixty days by the railroad company, with interest and costs, or, in default thereof, that the mortgaged property be sold by the special masters designated in the decree, after six weeks' publication of notice, upon certain conditions in such decree more fully set forth; awarding a deficiency judgment against the said railroad company for the difference between the net proceeds of sale of the mortgaged property and the mortgage debt and interest as aforesaid; dismissing the cross bill of the cross-complainants Hamlins as against the Continental Trust Company, surviving trustee; also dismissing the said joint intervening petition: which decree was by the court afterwards, and on the 16th day of May, modified by providing that the preferred shareholders should have priority over the common stockholders in the distribution of any surplus arising from the sale of said property of the railroad company remaining after the payment of all debts, and that such shareholders should have the right to use their preferred share certificates to pay any bid made by them for said mortgaged property, to the extent to which they would be entitled to participate in the proceeds of sale of said property if payment were made in cash: all of which will more fully appear by reference to pp. 3871-3943, Vol. 2 of the transcript.

That at the time of rendering the said decree of foreclosure, the court filed its opinion, in which it found that all the bonds and common stock of the said railroad company, amounting the bonds to $9,000,000, the common stock to $11,250,000, in par value, and preferred stock to the amount of $1,000,000 in par value, were delivered by the railroad company to Kneeland under a contract between him and said railroad company, by the terms of which he was to discharge the liens on said railroad, widen such railroad to a standard gauge, and otherwise improve and better it, and also to equip it, and to pay the interest upon said outstanding bonds accruing while said work of improvement, betterment and equipment was going on, to the extent to which the net earnings of said railway would be insufficient to de-

fray the same, and that such bonds and stock should be issued to him by the railroad company in full payment therefor; that the value of the consideration thus to be paid by Kneeland for said bonds and stock, including the customary contractors' profit, was about $8,000,000, that the market value of the common stock so issued did not exceed 15 cents on the dollar, nor the market value of the preferred stock 30 cents on the dollar; that distributing so much of the consideration of the stock and bonds to the stock on the basis of its market value, the bonds were sold for not less than 76.6-10 per cent. on the dollar, and were not therefore sold in violation of such Section 3290, Revised Statutes of Ohio; that while one Quigley, the president and director of the company, while such president and director, became the partner of and jointly and equally interested with the said Kneeland in the said contract under which the said stock and bonds were issued, yet such contract between Kneeland and the Railroad Company became effectual prior to the formation of such partnership, and that although none of the stock or bonds in question had been issued under said contract prior to the formation of such partnership, and although 4,550 of said bonds, being those numbered consecutively from 1 up to 4,550, were issued during the existence of the co-partnership between Kneeland and Quigley in the said contract, and prior to its dissolution, that Quigley derived his interest in and title to such bonds from Kneeland and not from the Railroad Company, and that therefore none of said bonds were obnoxious to the provisions of said Section 3313, Revised Statutes of Ohio.

23. That afterwards, and on the 7th day of June, 1898, the said Toledo, St. Louis & Kansas City Railroad Company, S. H. Kneeland, the said joint intervening petitioners, and said Charles Miller, duly appealed from said decree of foreclosure of April 1, 1898, and the said modification thereof rendered May 16, 1898, to the Circuit Court of Appeals for the Sixth Judicial Circuit of the United States, as will more fully appear by reference to pp. 3922-3967, Vol. 2 of Transcript.

24. That afterwards the said cross-complainants Hamlins appealed to the Circuit Court of Appeals from so much of the said decree of foreclosure of April 1, 1898, as modified as aforesaid on the 16th day of May, 1898, as prescribed the conditions under which they should be entitled to use their preferred share certificates to pay any bids that they might make upon the sale of the mortgaged property.

25. That afterwards, and on the 5th day of July, 1899, the said Circuit Court of Appeals rendered a decree affirming in all things the decrees appealed from by your petitioners, but modifying such decrees on the said appeal of the cross-complainants Hamlins by providing that, in case of the purchase of the mortgaged property by the preferred shareholders, they should take and hold the same

subject to a lien in favor of such creditors as had or should establish their claims as creditors under the general creditors' bill.

26. That, as will appear by reference to the first to the tenth assignment of errors in page 3926, volume 1, transcript, it was assigned for error by all of your petitioners upon said appeal that the said Circuit Court erred in entertaining jurisdiction of the foreclosure proceedings, in not dismissing the foreclosure bill and suit for want of jurisdiction in the lack of the necessary diverse citizenship of the parties thereto, in adjudging and decreeing that the foreclosure bill and suit was not an independent suit, in adjudging and decreeing that the foreclosure bill and suit was ancillary to the general creditors' suit, and in maintaining jurisdiction thereof as dependent upon the general creditors' suit, and it was argued and contended by them upon the hearing and trial of the appeal; (*b*) that inasmuch as the general creditors' suit was *in fieri* when the foreclosure proceedings were instituted, and *that court* had then full power and jurisdiction to afford in *that suit* all appropriate relief for the protection and enforcement of the rights of the bondholders and mortgagees upon their coming into or intervening in *that suit*, and seeking such relief, and thereby becoming parties to such creditors' suit, no necessity existed for taking the proceedings which has been taken for the enforcement of said bonds, coupons and mortgage in disregard of the constitutional and statutory limitation upon the jurisdiction of the Circuit Court; (*b*) that said proceedings did not constitute a coming into or intervention in said general creditors' suit by the mortgagees or bondholders, nor were they so intended by them, nor did such proceedings make the mortgagees or bondholders parties to the general creditors' suit, nor did such proceedings constitute an invoking of the auxiliary or dependent jurisdition of the Circuit Court in that suit; but that, on the contrary, the acts and proceedings of the mortgagees and bondholders, in petitioning for leave to make and in making the receiver appointed in the general creditors' suit a party defendant in the foreclosure proceedings as owner of some interest in the mortgaged property by way of lease, mortgage or otherwise, subject and subordinate to the mortgage, and in taking a decree *pro confesso* against him; in filing the foreclosure bill and in praying for and obtaining therein an independent and separate receivership of the mortgaged property for the exclusive benefit of the mortgagees, thereby renouncing and abandoning the benefit of the receivership established in the general creditors' suit, and their claim under their mortgage upon the income accruing during the said first mentioned receivership; in praying for process against and serving the same upon the defendants in the foreclosure bill; in praying for and obtaining a decree of foreclosure of the mortgage, and an order for a deficiency judgment against the mortgagor, and in conducting all such foreclosure proceedings separate and apart from and wholly independent of the general

creditors' suit and the acts of the Circuit Court in making and entering the orders consolidating the foreclosure proceedings and the general creditors' suit under the title of the former; in establishing said independent receivership; in making and entering said orders granting leave to make such first mentioned receiver a party defendant to such foreclosure proceedings; in rendering a decree *pro confesso* against such receiver; in entitling, docketing and numbering said foreclosure proceedings upon the files and records of the court as a separate suit, and in conducting all the proceedings therein separate and apart from and independent of the general creditors' suit, distinguished the foreclosure proceedings as hostile and adverse to the general creditors' suit, and impressed and constituted them as independent and not dependent in character.

Yet notwithstanding the said Circuit Court of Appeals held and adjudged that none of the errors so assigned were well founded, and that the relation between the said creditors' suit and the said foreclosure proceedings is principal and incillary only so far as that, without the possession of the *res* in the former, the court would have no jurisdiction of the latter, but having thus acquired and thus maintaining its jurisdiction in the second suit, the court proceeds in it without further regard to the pleading, or course, of the principal action, and that therefore the rule as to who may appear to a foreclosure bill and file answers is the same here as if the bill had in fact been an independent bill, all of which will more fully appear by reference to pages 3080, Volume 3 of the transcript.

27. That it was assigned for error upon said appeal, by all of said appellants, including your petitioners, that the Circuit Court erred in proceeding to a hearing and trial on the merits of the issues arising in the foreclosure bill of suit before the consolidated suit was ripe for the determination of the rights of all the parties thereto, and likewise erred in proceeding to such hearing and trial before the claims filed by the creditors with the special Master under the decretal order of reference were ripe for determination by the court as to the amount and validity thereof; in rendering the decree of foreclosure without determining the objections filed before the special Master by creditors to the claims filed by the Continental Trust Company and the committee of bondholders on behalf of the holders of the bonds adjudged by said decree to be issued under and secured by the mortgage therein mentioned, based upon such bonds, coupons and mortgage; in rendering the decree of foreclosure, and in sustaining the claims based upon the bonds and coupons mentioned in said decree of foreclosuee filed before the special Master under the decretal order of reference, without determining the rights of other creditors who filed their claims with such special Master under such decretal order of reference, and objections to the claims founded upon such bonds and coupons and in referring back to the

special Master for his finding of fact and conclusions of law, the amount and validity of the claims filed before him under the decretal order of reference herein, as will more fully appear by reference to the 11th to the 35th assignments of error, inclusive, on pages 3926 and 3932, volume 2 of the transcript; and it was argued and contended by them upon the hearing and trial of said appeal;

(*a*) That inasmuch as the mortgaged property had been taken over by the court under the general creditors' suit for general administration, and was in its possession for that purpose when the foreclosure proceedings were instituted; (*b*) and inasmuch as the bondholders, after instituting the said foreclosure proceedings, filed their claims with the Master under the decretal order of reference, and thus mixed their character as secured and unsecured creditors; (*c*) and inasmuch as the bondholders and mortgagees, by filing their claims upon said bonds, coupons and mortgage with the Master under said decretal order, after instituting said foreclosure proceedings, thereby elected to abandon said foreclosure proceedings; (*d*) and inasmuch as objections were duly filed to such claims of the bondholders by the defendant railroad company, the joint intervening petitioners, by Charles Miller and other creditors filing their claims with the Master under said decretal order, no decree of foreclosure should have been rendered at all, nor a decree of sale, until all objections to the said claims filed by the bondholders with the Master, under the said decretal order, and the rank and amount of all claims filed by creditors of the insolvent debtor with the Master under the said decretal order should have been determined finally by the court, to the end that each class of creditors and each creditor of each class might know to what extent his established claim might be receivable in payment of the purchase price of the insolvent estate, and such estate thus made to go as far as possible towards the payment of all the claims of all the creditors, but that if any decree for the sale of the insolvent estate be rendered before such final determination, such sale should be made upon condition that the purchase price be paid in cash into the registry of the court for final distribution among the creditors of the insolvent, according to the rank and amount of their respective claims as finally determined by the decree of the court.

Yet the said Circuit Court, without hearing or disposing of said objections to said claims of the bondholders filed with the Master under said decretal order, and without notice to the petitioner, Charles Miller and other creditors, filing objections to said claims, or an opportunity to be heard with respect to such objections, rendered a decree of foreclosure, and in and by the same adjudged and decreed: (1) that all the allegations of the foreclosure bill were true; (2) that all the bonds, coupon and mortgage in question were valid and the defendant Railroad Company indebted to the bondholders and mortgagees therein in the sum of upwards of

$12,000,000; (3) the foreclosure of the mortgage and the sale of the mortgaged property to pay the same; (4) the use of the bonds and coupons to pay the purchase price upon such sale; (5) dismissing the said joint intervening petition but without making any provision for saving or protecting the rights of the unsecured creditors who filed their claims with the Master under said decretal order, and their objections to the said claims of the bondholders; and the said Circuit Court of Appeals erroneously affirmed the said action, orders and decrees of the Circuit Court in all things: all of which will more fully appear by reference to said decrees of the Circuit Court, on p. 3903, volume 2 of the transcript, and the said decree of the Circuit Court of Appeals at p. , of volume 3 of the transcript.

28. That by the 36th to the 46th assignments of error, both inclusive (pp. 392-3-4, Vol. 2, Transcript), all of said appellants including your petitioners, except Kneeland, assigned error upon the the action of the Circuit Court; (*a*) in finding and decreeing that the value of the consideration for the stock and bonds issued to Kneeland and associates was not less than $8,000,000; (*b*) in apportioning the consideration for the stock and bonds issued to Kneeland and associates between the same upon the basis of their respective market or actual value, instead of upon the basis of their value as numerically expressed in dollars upon the face thereof; (*c*) in finding and adjudging that none of said bonds were sold by the railroad company at less than 75 cents on the dollar, in violation of said Section 3290, Revised Statutes of Ohio; (*d*) in not finding and adjudging that said bonds, coupons and mortgage, and each of them, are not and never were negotiable, and are not and never were held or owned by *bona fide* purchasers for value, and are open and subject to said objections and defense; that the same were sold by the railroad company at less than 75 cents on the dollar, in violation of said Section 3290, and are, by reason thereof, null and void and unenforcible; and on the hearing and trial of said appeal they argued and contended in said Circuit Court of Appeals: (1) that, by the terms of the contracts under which the railroad company issued said stock and bonds, $4,805,000 in par value of preferred stock was to be and was issued to pay for the railroad in question, as it then existed, subject to underlying liens; $1,000,000 of preferred stock to Kneeland and associate in reimbursement for discharging such underlying lines, and the said $9,000,000 of bonds and $11,250,000 in par value of common stock was to be and was issued to Kneeland and associates in payment *in solido* for improving, bettering and equipping said Railroad and paying the deficiencies in interest; (2) that the aggregate value of the entire agreed consideration for all said stock and bonds did not exceed $11,000,000; (3) that the value of the agreed consideration for the $4,805,000 of preferred stock, issued in payment of said Railroad, did not exceed $1,500,000; (4) that the value of the agreed con-

sideration for the $1,000,000 preferred stock issued to Kneeland and associates as aforesaid did not exceed $1,200,000; (5) that the value of the agreed consideration for the said bonds and common stock issued to Kneeland and associates as aforesaid did not exceed $8,000,000; (6) that the provisions of the agreements under which said bonds and common stock were issued to Kneeland and associates specifically prescribed that the consideration for the common stock was the same as the consideration for the bonds; (7) that on principle, as well as by force of said last mentioned stipulation, the consideration for said stock and bonds was apportionable between them upon the basis of their respective values as numerically expressed in dollars upon the face thereof, and not otherwise; (8) that upon either of said bases of apportionment of the said consideration for said stock and bonds, the bonds were sold by the company at less than 75 cents on the dollar, in violation of said Section 3290, Revised Statutes of Ohio; (9) that said bonds, coupons and mortgage are not, nor are either of them negotiable by reason of uncertainty in the amount payable, thereby, as well as by reason of uncertainty in the time of payment thereof; (10) that the present owners or holders of said bonds, coupons and mortgage are not bona fide purchasers thereof; (11) that said bonds, coupons and mortgage are null and void and unenforcible by reason of the foregoing facts.

Nevertheless, the said Circuit Court of Appeals erroneously refused to decide the said questions of the negotiability of said bonds and the said question of the bona fides of the present owners and holders thereof, and erroneously overruled all the said other contentions of said appellants and your petitioners and each of them, and affirmed the said findings and decree of said Circuit Court, upon which your petitioners assigned error by their said 36th to the 42nd assignments of error, both inclusive, as aforesaid, and adjudged that none of said bonds were sold by the company at less than 75 cents on the dollar, or in violation of said Section 3290, Revised Statutes of Ohio.

29. That by their 43rd to 60th assignments of error, both inclusive, (pp. 3934-39, Vol. 2, Transcript) all of your petitioners except the said Kneeland assigned for error upon said appeal the action of the Circuit Court (*a*) in finding and adjudging that the contracts of January 23, 1886, under which the bonds and stock were issued by the railroad company, were binding upon the constituent companies, and became binding upon the consolidated company as a result of the consolidation; (*b*) in finding and adjudging that the written agreement between Quigley and Kneeland, of July 8, 1886, of copartnership and equal joint interest in said contracts of January 23, 1886, and the profits thereof, was not made until after said contracts of January 23, 1886, had become effectual and binding upon the consolidated company; (*c*) in finding and adjudging that therefore Quigley derived his title to and interest in

the bonds issued under said contracts of January 23, 1886, during the existence of such copartnership from Kneeland and not from the railroad company; (*d*) in finding and adjudging that none of said bonds were purchased from the railroad company by directors thereof at less than par; and on the hearing and trial of said appeal your petitioners argued and contended (1) that contemporaneously with the execution and delivery of said contracts of January 23, 1886, under which said bonds and stock were issued, an oral agreement was entered into between the said Quigley and Kneeland, by which the said Quigley was to be and was made president and a director of the consolidated company, in order to facilitate the adoption and carrying out by the consolidated company of said contracts of January 23, 1886, and by which they were to become and did become jointly and equally interested, as partners, in said contracts of January 23, 1886, and in the profits thereof, which agreement was in substance reduced to writing and signed by them on the 8th day of July, 1886; (2) that the constituent companies did not become bound to Kneeland or associates for the issuance to Kneeland or associates, by the consolidated company or by themselves, of the stock and bonds, or Kneeland or associates to the constituent companies that they would discharge the underlying liens on or improve, better or equip said railroad, or pay deficiencies in interest on outstanding bonds, and that the consolidated company did not, by force of the consolidation, become bound by said contracts of January 23, 1886; that the first act of recognition or adoption of such contracts on the part of the consolidated company was the execution and delivery to the trustees Ingersoll and White of some of said bonds on the 21st day of July, 1886, thirteen days after the execution of said written contract of co-partnership; (3) that in any event, as the stipulations of said contracts of January 23, 1886, on the part of Kneeland and associates, to pay underlying liens, deficiencies in interest on outstanding bonds to improve, better and equip said railroad, and of the consolidated company to issue bonds and stock in payment therefore, were, when said agreement of co-partnership was entered into, wholly executory on both sides, involved further agreements, assent and approval on the part of the consolidated company of the acts of performance by Kneeland and associates as a condition precedent to the issue and delivery of stock and bonds by the trustees Ingersoll and White, and such stipulations were unenforcible in equity by either party against the other, and as such stipulations were illegal and unenforcible in contemplating and involving the sale of said bonds at less than 75 cents on the dollar, as heretofore pointed out, and the sale of the common stock at less than par, contrary to the public policy of the States of Ohio, Indiana and Illinois, the carrying out of said stipulations was not obligatory upon either party, but purely voluntary on the part of both parties thereto, and that therefore the said copartnership of Kneeland and Quigley derived

their title to said bonds from the consolidated company and not from Kneeland, and that such bonds are null and void under said Section 3313, Revised Statutes of Ohio; (4) that such objection and defense to said bonds, coupons and mortgage is effectual and available against the present owners and holders thereof, not only because such owners and holders are not *bona fide* purchasers thereof, but because such bonds, coupons and mortgage are not negotiable, as heretofore pointed out, and furthermore such objections and defense are made effectual and available against *bona fide* purchasers of negotiable bonds, coupons and mortgages of railroad corporations by the terms of said Section 3313; yet the said Circuit Court of Appeals erroneously refusing to decide said question of non negotiability and *bona fides*, erroneously overruled all the other said contentions of your petitioners, and found and adjudged thereon, as did the Circuit Court, as aforesaid, and in addition thereto that said Section 3313 only affects the personal capacity of the directors to buy bonds from the corporation at less than par, establishes no rule of public policy, and is available only to the corporation and its stockholders, and that consequently the word "void" in said section means *voidable*, and the objections to the purchase of the bonds in question by Quigley has been waived by the railroad company as well as the stockholders.

30. That it was assigned for error upon said appeal by all of your petitioners except the railroad company and said Kneeland; that the Circuit Court erred in overruling their contentions that the said attempted consolidation and formation of the Toledo, St. Louis & Kansas City Railroad Company was unauthorized by the laws of Ohio and Illinois as aforesaid, as will more fully appear by reference to the 61st to the 64th assignments of error, both inclusive, p. 3939, Vol. 2, Transcript. And upon the hearing and trial of said appeal it was argued and contended by them, as it was in the Circuit Court as aforesaid, that no corporation, either *de facto* or *de jure*, was created by said attempted consolidation. Yet the Circuit Court of Appeals, upon said appeal, upheld and affirmed the said decision of the Circuit Court upon said subject, and adjudged that by such consolidation a corporation *de jure* as well as *de facto* was effected; all of which will more fully appear by reference to the opinion of the said Circuit Court of Appeals, on pp. 3981 to 3987, Vol. 3 of the Transcript.

31. That it was assigned for error upon said appeal, by your petitioners, the Toledo, St. Louis & Kansas City Railroad Company and S. H. Kneeland, that the Circuit Court erred in adjudging and decreeing that the holders of the preferred stock were entitled to a preference over the holders of the common stock of said company in the distribution of capital; as will more fully appear by reference to the assignments of error numbered 72 to 88, both inclusive, on pp. 3957-3959, Vol. 2, Transcript. And on the hear-

ing and trial of such appeal it was argued and contended by them (*a*) that the language contained in the certificates of and representing said preferred stock, to-wit: "This stock constitutes a lien upon the property and net earnings of the company next after the company's existing first mortgage," does not have the legal effect of creating a preference to the holder over the holders of the common stock in the distribution of capital, but only establishes a lien for the sole obligation imposed on the company in the payment of the 4 per cent. non-cumulative, annual dividends payable out of net earnings as provided in the certificates, when earned and not paid; (*b*) that inasmuch as in the articles of consolidation by which the railroad company was created, if at all, the only preference prescribed in the classification of the stock of the company is that of dividends out of earnings, and inasmuch as the Statutes of each of the States under whose laws the consolidation was effected, if at all, require the articles of consolidation to be recorded in certain public offices, in order that the public and parties dealing with the company shall be informed of the contents of such articles and of the powers attempted to be assumed by the company thereby, and inasmuch as the asserted claim of preference in the distribution of capital is ascribed by the parties claiming such preference wholly and entirely to a private, unpublished and unrecorded agreement between the two classes of shareholders, not made a part of the articles of consolidation and charter of the company, by way of amendment or otherwise, or made a matter of public record either in the offices where the articles of consolidation were recorded or otherwise, such arrangement and agreement is a fraud on the public and those dealing in the common stock. Yet the Circuit Court of Appeals erroneously overruled and denied all the said contentions of your petitioners, and held and adjudged, as did the Circuit Court herein, and that the preferred shareholders were entitled to use their shares in the payment of any bid they might make for the insolvent estate upon the sale thereof under said decree of foreclosure, upon payment of the mortgage debt, interest, costs, etc., and to hold the property so purchased subject to a lien in favor of all creditors of the Railroad Company who had or should come into the creditors' suit and establish their claims.

32. That your petitioners have requested the said appellant's the Signal Oil Works (Limited) the said Charles Miller to unite with them in this petition but each has refused to do so and are therefore made respondents herein.

Your petitioners, submitting herewith a proved copy of the entire record in the litigation hereinbefore referred to, marked Exhibit A, Vols. 1, 2 and 3, respectively, respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full

and complete transcript of the record, and all proceedings of the said Circuit Court of Appeals in the said case therein entitled Dana A. Rose, intervening petitioner, appellant, *vs.* The Continental Trust Company of New York, The Toledo, St. Louis & Kansas City Railroad Company, Charles Hamlin, Ellen V. Hamlin, Hannibal E. Hamlin and Frank Hamlin, appellees, No. 640, and The Toledo, St. Louis & Kansas City Railroad Company, The Building & Contracting Company of Kentucky, Rhode Island Locomotive Works, Rhode Island National Bank, Signal Oil Works (Limited), Jules S. Bache, Ferdinand E. Canda, Charles Miller and Sylvester H. Kneeland, appellants, *vs.* The Continental Trust Company of New York, surviving trustee, *et al.*, appellees, No. 641; to the end that the said cases may be reviewed and determined by this court as provided in Section 6 of an Act of Congress, entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Approved March 3, 1891," or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said Act, and that the said judgments, decrees and orders of the said Circuit Court of Appeals in the said causes, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray.

James D. Springer,
J. Spalding Hurd,
Attorneys for Petitioners.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

JAMES D. SPRINGER, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the above named petitioners; that he was of counsel for some of the appellants in the litigation referred to in the foregoing petition, has read the foregoing petition, and that the statement of the occurrences therein detailed is true, as he verily believes; that the foregoing petition is interposed in sincerity and good faith, and not for the purpose of delay, and that in his opinion it is well founded.

James D. Springer.

Subscribed and sworn to before me
the 10th day of January, 1900.

Hattie B. Lehman,
Notary Public,
Cook County, Illinois.

(seal.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

Dana A. Rose,
Petitioner,
vs.
The Continental Trust Company of New York, Toledo, St. Louis & Kansas City Railroad Company, Charles Hamlin, Ellen V. Hamlin, Hannibal E. Hamlin, Frank Hamlin et al.,
Respondents.

PETITION FOR CERTIORARI.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

DANA A. ROSE, *Petitioner,*

vs.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY, JOSEPH S. STOUT, RANDOLPH F. PURDY, CHARLES HAMLIN, ELLEN V. HAMLIN, HANNIBAL E. HAMLIN AND FRANK HAMLIN ET AL., *Respondents.*

PETITION FOR CERTIORARI

To the said respondents, Continental Trust Company of the City of New York, and Messrs. Cary & Whitridge and E. C. Henderson, its solicitors and counsel; Toledo, St. Louis and Kansas City Railroad Company and Lawrence Maxwell, Jr., its solicitor and counsel; Joseph Stout and Randolph F. Purdy and Baker, Smith & Baker and Foster & Thompson, their solicitors and counsel; Charles Hamlin, Ellen V. Hamlin, Hannibal E. Hamlin and Frank Hamlin and J. Treadwell Richards and Doyle & Lewis, their solicitors and counsel:

Please take notice that on Monday, the twenty-second day of January, A. D. 1900, at the opening of court upon that day or as soon thereafter as counsel can be heard, at the Capital in the City of Washington, D. C., we shall

submit to the Supreme Court of the United States the petition for *certiorari* of Dana A. Rose, and on his behalf, together with a brief and argument in support of said petition, a copy of which petition and brief is herewith served upon you.

Very truly yours,

JOHN S. MILLER,
Counsel for Petitioner, Dana A. Rose.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

Dana A. Rose,
Petitioner,
vs.
The Continental Trust Company of New York, Toledo, St. Louis & Kansas City Railroad Company, Charles Hamlin, Ellen V. Hamlin, Hannibal E. Hamlin, Frank Hamlin et al.,
Respondents.

PETITION FOR CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Dana A. Rose, represents:

I. That the Circuit Court of the United States for the Western Division of the Northern District of Ohio on April 1, 1898, entered its certain final decretal order in the consolidated suit hereinafter mentioned, (1) denying the motion of this petitioner, D. A. Rose, theretofore made for a rule on the Continental Trust Company and other parties to demur, plead or answer to the interven-

ing petition theretofore filed by said Rose under the order of said court; and (2) striking the said petition of said Rose from the files; and (3) also ordering that the application of the said Rose to become a party to said suit and to file his said intervening petition as an answer and intervening petition be denied; and (4) ordering that the certain objections theretofore filed by this petitioner with the special master in said suit to the claim of the Continental Trust Company filed with said special master and also the certain objections of said Rose filed with said special master to the claim of the bondholders' committee filed with said special master, be respectively stricken from the files and stricken out.

The result of the above decretal order was that the said Rose was denied any hearing or consideration of his rights or case by the Circuit Court. But the Circuit Court thereupon afterwards, in the absence of said Rose and without hearing his case or contentions or giving him any opportunity to be heard, but so denying his request to be heard, entered its further and final decree in said cause for the sale of the property of the Toledo, St. Louis and Kansas City Railroad Company, in which the said Rose in and by his said pleading claimed and asserted an interest, and for the disposition of the proceeds of such property to other persons and parties.

And thereupon the said Rose having prayed and been allowed and having perfected his appeal from said final decretal order to the United States Circuit Court of Appeals for the Sixth Circuit, that court heard the said appeal of the said Rose, together with the appeals of certain other parties from certain of such other decrees, and thereupon erroneously held *that the said Rose was never a party to the suit except in so far as he may be bound by a*

decree through representation by those having the same interest and admitted as representing a class; and that that gave him no independent status as a party or right to be heard upon the said petition; and that from an application for leave to intervene or become a party and the denial of such application no appeal lies from the decree denying such application, and that the appeal of the said petitioner Rose should be dismissed. And the said United States Circuit Court of Appeals accordingly dismissed the appeal of said Rose, or affirmed the decree on his appeal, and proceeded to hear and determine the said appeal of other parties in the said case and the said case thereon in the absence of said Rose and without considering his claims or contentions but refusing to hear or consider the same.

II.

SUMMARY OF THE SUIT AND PETITIONER ROSE'S INTERVENTION AS A PARTY UNDER ORDER OF THE COURT.

1. *General creditors' suit of Stout and Purdy.*

On May 18, 1893, Stout and Purdy, claiming to be judgment creditors of the Toledo, St. Louis and Kansas City Railroad Company, filed their creditors' bill on behalf of themselves and all other creditors in the Circuit Court for the Northern District of Ohio against that company and others. The bills alleged that the defendant railroad company was a corporation existing under the laws of Ohio, Indiana and Illinois, and was the owner and possessed of a continuous railroad about 450 miles in length, extending from Toledo, Ohio, to East St. Louis, Illinois; the recovery of judgment by complainants

against said company and the issue and return unsatisfied of execution and the insolvency of the said railroad company. The bill prayed for an account of the several debts owing by the defendant railroad company to all its creditors; that all its property, assets, franchises and privileges be sold under orders of the court; that out of the proceeds each and all the creditors be paid in proportion to and in accordance with their several just liens, claims and demands as found by the court; that a receiver be appointed, and for general relief. This suit, then, was a creditors' winding up or administration suit. Said suit was numbered 1155 in equity. On the same day, by order of the court, a receiver (Mr. Callaway) was appointed. (Pr. Trans., Vol. 1, p. 15.)

2. *Intervention therein of mortgage bondholders' committee.*

On November 20, 1893, a bondholders' committee, Messrs. Havemeyer, Armour, Hartshorne, Bannard and Paton, as holders of mortgage bonds of said railroad company, and as a bondholders' committee appointed by a bondholders' agreement of August 4, 1893, of holders of mortgage bonds of said railroad company, filed their petition of intervention, praying to be permitted to intervene and be made parties to said suit. (*Id.*, 20.) And by order entered on the same date said petition was granted and said petitioners were made parties to said creditors' suit. (*Id.*, 26–27.)

3. *Filing of bill to foreclose mortgage.*

On December 13, 1893, the Continental Trust Company of New York, and John M. Butler, a resident of Indiana, claiming to be successor trustees in the mort-

gage given by said railroad company, filed their petition in said court stating that they were about to file in said court a bill for the foreclosure of said mortgage and desired to make Callaway (who was the receiver appointed in said creditor's suit) a party thereto, and praying that they might be permitted to make Callaway a party to such foreclosure suit. (*Id.*, 29-31.) And thereupon, on the same day, an order was made granting such leave to make Callaway, receiver, a party to said bill of foreclosure. (*Id.*, 32.)

Upon the same day the Continental Trust Company and Butler filed in said court their bill to foreclose, making the railroad company, Callaway, receiver, Stout and Purdy and others defendants. (*Id.*, 32 to 60.) The bill alleged the making of the mortgage and issue of $9,000,000 of bonds of railroad company, and that the complainants were appointed successor trustees as therein stated; and that the mortgage provided that in case of default in payment of interest continuing for six months, then immediately upon the expiration of said six months, at the option of the holders of one-half part of the bonds outstanding, the whole of the bonds, together with the interest thereon, should become and be considered as forthwith due. And the bill alleged default in interest, continuance of default for six months and option and declaration of maturity by holders of one-half of the bonds.

Thereupon, on the same day, upon presenting to the court said bill of foreclosure and on motion of complainants therein, the court appointed Callaway (the same person who had been appointed receiver in said creditors' suit) receiver of the said railroad company. (*Id.*, 61-63.)

4. *Consolidation of creditors' suit and foreclosure suit.*

Upon the same day an order was entered in said creditors' suit No. 1,155 consolidating said creditors' suit with the said foreclosure suit. (*Id.*, 27-28.) And a similar order of consolidation of said two suits was entitled in the said foreclosure suit, No. 1,205. These orders provided that said actions should be and were consolidated under the name of *Continental Trust Company of the City of New York and John M. Butler* v. *Toledo, St. Louis & Kansas City Railroad Company et al.*; that said consolidated cause should thereafter proceed and be prosecuted under said name and style.

5. *Intervention and answer and cross-bill of Hamlins, holders of preferred stock.*

Afterwards, on August 20, 1894, Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin and Ellen V. Hamlin filed their petition and application to become parties to said consolidated suit, and also presented therewith and filed their answer and their cross-bill. (*Id.*, 95 to 132.) Said petition of the Hamlins alleged that they were the owners and holders of the "certain debenture or coupon obligations" of the defendant railroad company described in said petition; that there are a large number of holders of such obligations of the same series and issue who are in like situation in reference thereto as said petitioners, the holders of a large number of which, exceeding two millions of dollars, are now acting in concert with them and have authorized the proper application to said court for leave to be represented in said suit and join in the prayer of said petitioners; and that there are also a large num-

ber of the holders and owners of such obligations who are unknown to said petitioners and with whom said petitioners and the other holders of the obligations are united in interest, but whose names and places of residence said petitioners do not know. And said petitioners filed said petition in behalf of themselves and all other holders of such obligations of the like issue, and who should choose to become parties thereto voluntarily, or who might by proper order and notice of the court be called upon, invited or required to intervene therein or become parties thereto by themselves in person or by proper representative (*Id.*, 96.)

The "certain debenture or coupon obligation" of the defendant railroad company, in said petition referred to, as set up in said petition (the form whereof is attached and made a part of said petition), are what is known herein as "preferred stock." The certificates thereof certified that the bearer was entitled to the number of shares therein specified, of one hundred dollars each of the preferred, non-voting stock of said railroad company; and that "this stock constitutes a lien upon the property and net earnings of the company, next after the company's existing first mortgage. It does not entitle the holder to vote thereon. That on the first day of January, 1888, it is entitled to an allowance of interest at the rate of 4 per cent. payable semi-annually, represented by interest coupons attached to the certificate, which interest is only payable out of the net earnings of the company, after the payment of interest on its existing first mortgage bonds, and the cost of maintenance and operation." (*Id.*, 104.)

Said Hamlin's intervening petition alleges that said obligations, while called preferred stock, are in fact obliga-

tions of said railroad company, creating a lien upon the property and income of said railroad company, and that the petitioners have a good and valid defense to the claim of the complainants in said suit to foreclose, and to the bill therein filed, and to complainant's present right to maintain this suit, and a legal right to be heard upon the ascertainment of the amount due thereon, and to redeem said property therefrom, and to have the amount and order of priority of their said lien and equity fixed and determined in order that they may use the same under proper rules established by any decree in bidding upon and purchase of said property; and that they also have a good legal and equitable defense to all charges, liens and claims made or asserted by any of the parties hereto, and are entitled to be heard upon the same. (*Id.*, 101.) And said petition prays that the petitioners may be allowed to become parties, and to intervene with all the rights and privileges of defendants to answer or otherwise plead to any and all bills, cross-bills, or intervening petitions filed or to be filed herein. (*Id.*, 103-4.)

The answer and cross-bill of Hamlins presented divers defenses and contentions which it is conceived need not be here set forth. (*Id.*, pp. 106–32.)

Thereupon, on October 19, 1895, the court entered its order giving said petitioners leave to file the answer and cross-bill presented by them, with a right to complainants to move to strike said answer and cross-bill from the files, or to modify it as they might be advised, or that, in lieu thereof, leave be given to petitioners to file simply an intervening petition; and that the conditions upon which and limitations under which said petitioners have such leave be reserved until the hearing and decision of said motion on the part of the complainants. (*Id.*, 133.)

It appears by the record that the Circuit Court having later vacated and set asi de the order allowing the Hamlins to file said intervening petition, answer and cross-bill, this latter order was reversed by the Circuit Court of Appeals for the Sixth Circuit upon appeal. (*Id.*, 457, 3872. See same reported as *Hamlin* v. *Trust Co.*, 47 U. S. App., 422; 24 C. C. A., 271; 78 Fed. R., 664.)

In its opinion on that Hamlin appeal, the Circuit Court of Appeals holds, as the construction of said preferred stock certificates, that

"The clear purpose of the provision making this stock a lien second only to the existing first mortgage is to secure to it a preference over the common stock, not only in respect to a limited dividend, but in the ultimate return of capital to those who contributed to it"; and "what we decide is that, although appellants are not creditors they are entitled, on the averments of their answer, to a preference in relation to the capital of this corporation, over common stockholders; and that, upon the averments of their answer, they were at least proper parties defendant, having a substantial interest antagonistic to the common stockholders, and therefore not to be properly represented by the corporation. It is a case in principle like that of any trustee in conflicting mortgages. Such a trustee cannot represent antagonistic rights of contending classes of lienors. When this is the case each class should be allowed representation."

The mandate upon said appeal was received and spread upon record July 15, 1897. (Print. Trans., Vol. 1, p. 457.)

6. *Order requiring creditors to present their claims.*

Thereupon, afterwards on October 16, 1897, the court ordered that the special master therotofore appointed should forthwith give thirty days' public notice, by ad-

vertisment, pursuant to the practice of the court, to all the creditors of said railroad company, requiring them on or before December 1, 1897, to file before him, under said creditors' bill of Stout and Purdy, full and itemized statements of their claims against such corporation, duly verified, and notifying all persons interested that all creditors failing to comply with said notice, or to prove their claims within said time, would be excluded from any decree or distribution under said cross-bill. (*Id.*, 484.)

7. *Order requiring other holders of said preferred stock to appear and join in Hamlins' cross-bill; and intervention by this petitioner Rose.*

And thereupon, afterwards, on October 23, 1897, the court further ordered that the master advertise in a daily newspaper of New York City, and in a newspaper of Toledo, "notice to all other holders of the preferred stock certificates like those set up in this cause by the Hamlins, to appear and be made parties complainant with said Hamlins in the representative cross-bill filed by said Hamlins within thirty days from the date hereof." (*Id.*, 493.)

It is conceived and submitted that the purpose of the above order was to require such other holders of such preferred stock to appear or be bound by the decree which might be entered in their absence with respect to the administration, liens, claims, priorities and distribution of the property of said railroad company and the proceeds thereof. And that when any such other holders should in fact appear, they became parties of right.

Thereupon, within the thirty days limited by said last mentioned order, the present petitioner, DANA A. ROSE, appeared and presented and filed his intervening petition, representing that he was the owner and possessed of a

large amount of the so-called preferred stock of said railroad company, amounting to 600 shares. Said Rose's petition averred that said Rose was not among the holders of preferred shares who were acting in concert with the said Hamlins, or who authorized them to represent such holders; that said petitioner Rose did not unite and join in the allegations, defense or case made by the said Hamlins in all respects or in any greater respect than the same may appear to be consistent with said petition of said Rose; and that said petitioner Rose therefore presented his separate intervening petition, and therein stated and set up certain facts and defenses and case; and said Rose petition further stated that *so far as said petition and cross-bill of said Hamlins was consistent, and not inconsistent with his, said Rose's, petition and the allegations, charges and matters therein set forth, said petitioner Rose adopts the same* and makes the same a part of his petition; and that the said Rose filed his said petition not only on his own behalf but on behalf of all other holders of such preferred stock who might desire to join therein and properly avail themselves thereof. And said Rose therein prayed that he become a party to said suit, with all the rights and privileges of the defendants to answer or otherwise plead, and that the court should make proper orders as necessary to accomplish that end; and that said petition might stand as a cross-bill and be taken and held to be properly filed on behalf of the petitioner and other holders of preferred shares, who might desire to avail themselves thereof within in the true meaning and intention of said order of October 23, 1897; that the Continental Trust Company, and said railroad company, and the other parties might be required to answer said petition and cross-bill as defendants

thereto; and that there should be an accounting between the petitioner and other holders of preferred shares and complainants and other parties as to who are holders of such stock, and as to the matters alleged in said petition and whether said bonds and mortgage are valid obligations of said railroad company, or whether any or what, if any, are such valid obligations, and whether the holders thereof, or any or either of them, are entitled to recover thereon, and what, if any, amounts are required to redeem said property; and that the rights of the respective parties in and to said property and the proceeds thereof be ascertained; and that said petition do also stand as answer to the bill of complaint of the Continental Trust Company, or that petitioners be allowed to answer the same, and for general relief. (*Id.*, 536–574.)

Said petition and cross-bill of said Rose, which was also made an answer to said foreclosure bill, set up certain defenses to the said bonds and mortgage and certain facts showing that said bonds were void, and denied the validity thereof.

Said Rose's petition also set up certain facts showing that 4,150 shares, amounting at the par value thereof to $415,000 of such preferred stock, claimed to be held by other persons represented by said Hamlins, was never properly issued, but was void and of no effect, and denying the validity of said 4,150 shares, or their right to share in any of the property or assets of the said railroad company.

In brief, the said Rose's petition and cross-bill and answer made these defenses to the said bonds:

(1) Denial of the appointment of complainant Continental Trust Company, trustee, or that complainants

Continental Trust Company or Butler, or either of them, were or are trustees or trustee under said alleged mortgage.

(2) Denial of default of railroad company in the payment of interest, or that any default in payment of interest continued for the space of six months, as was required by the terms of said alleged mortgage set up in said bill of foreclosure as a condition precedent to authorize the holders of one-half part of said bonds outstanding under said mortgage to elect and declare the principal thereof to be forthwith due and payable. (Print. Trans., Vol. 1, p. 39, 52.)

(3) Denial that after any such continuance of default or at any time in pursuance of any alleged power or otherwise the holders of one-half part of any bonds outstanding under any mortgage of defendant railroad company declared the whole of such alleged bonds to be forthwith due or payable.

The above defenses are set up in the Hamlins cross-bill (Print. Trans., Vol. 1, p. 109-110), and are adopted by Mr. Rose in his pleading (*Id.*, p. 573). The following defenses are set up in the Rose pleading, either additional to or different from or more fully than the defenses set up in the Hamlins pleadings.

(4) That the pretended issue of said bonds was procured by fraud and circumvention practiced upon the said railroad company and upon the persons receiving and the holders of such preferred stock, by one Quigley, who was then president and a director of said railroad company and was also at the same time trustee for the persons who acquired the preferred stock of said last named company in exchange for their prior bonds and in-

terest in said railroad, and who (said Quigley) as such president and director, with defendant Kneeland, dominated and controlled the issue and disposition of said bonds by said railroad company, and who (Quigley) was at the same time a copartner of said Kneeland in the acquisition by said Kneeland of said bonds and personally interested therein; and that through and by means of such fraud and circumvention the said bonds were by said Quigley procured to be issued without the payment to or receipt by said railroad company of any adequate consideration therefor; and that said railroad company did not receive for said bonds to exceed 25 per centum of the par value thereof. (Print. Trans., Vol. 1, p 559.) And the said pleading sets up the facts of said fraud and circumvention and alleges that holders of said bonds acquired the same with notice of the facts and circumstances of fraud therein stated and charged. (*Id.*, pp. 552-559, 567.)

(5) That a large number of said bonds were sold by the directors of said company for less than seventy-five cents on the dollar in violation of section 3290 of the Revised Statutes of Ohio, which provides with respect to the issue and disposition of such bonds as follows:

"The directors of the company may sell, negotiate, mortgage or pledge such bonds or notes, as well as any notes, bonds, scrip or certificates for the payment of money or property which the company may have theretofore received or shall hereafter receive as donations, or in payment of subscriptions to the capital stock or for other dues of the company, at such times and in such places, either within or without the state, and at such rates and for such prices, at not less than seventy-five cents on the dollar, as in the opinion of the directors will best advance the interest of the company; and if such notes or bonds are thus sold at a discount, without fraud, the sale shall be as valid in every respect, and the securi-

ties as binding for the respective amounts thereof, as if they were sold at their par value."

And the petition averred that the holders of the said bonds in the said petition mentioned acquired their bonds with notice of the facts and circumstances of fraud, as stated and charged in the said petition. (Print. Trans., Vol 1, pp. 552, 559, 563, 567.)

(6) The said petition alleges that a large number of said bonds were purchased by the said railroad company by a director thereof for less than the par value thereof in violation of section 3313, Revised Statutes of Ohio, which provides as follows:

"All capital stock, bonds, notes or other securities of a company purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof shall be null and void."

The petition of Rose alleges that a large number of said bonds were purchased of the company by Quigley, a director thereof, directly or indirectly through the purchase thereof from the railroad company by Kneeland and Quigley as copartners, and for less than the par value thereof. The petition alleges that bonds Nos. 1 to 6,000 were so purchased, and charges that 9,000 of them were so purchased from the company by a director for less than par. And it also alleges that the holders of the bonds acquired their bonds with notice (Prin. Trans., Vol. 1, pp. 552-3, 557-59, 559-61, 567), and charges that said bonds are null and void.

(7) Said Rose petition alleges that certain of the said alleged bonds of said railroad company herein sought to be enforced, which are in said petition specified, were at times therein mentioned purchased, directly or indirectly, of said railroad company for less than the par value

thereof and at prices therein alleged, in violation of said section 3313 of the Revised Statutes of Ohio, by certain persons in said petition named, and that such persons were at the time of such purchase, respectively, directors of said railroad company, viz:

By Clarence Brown, 13 bonds. (Print. Trans., Vol. 1, p. 561-2.)

By H. O. Armour, 150 bonds. (*Id.*, p. 562.)

By H. O. Armour & Co., composed of said H. O. Armour and others, 250 bonds. (*Id.*, p. 562.)

By John C. Havemeyer, 503 bonds. (*Id.*, p. 563-565.)

By Halsey J. Boardman, 15 bonds. (*Id.*, p. 564.)

By Gilder, Farr & Co., composed of W. H. Gilder (a director) and others, 156 bonds. (*Id.*, p. 164-5.)

By Robert Harris, 12 bonds. (*Id.*, p. 566.)

By Stout & Co., composed of Joseph S. Stout (a director) and others, 300 bonds. (*Id.*, p. 566.)

By James M. Quigley, 375 bonds. (*Id.*, p. 566.)

By Charles F. Jag, 14 bonds. (*Id.*, p. 567.)

And the petition charges said bonds are null and void, and that the holders of said bonds received acquired the same with notice. (*Id.*, p. 567.)

Said Rose petition, among the relief prayed, as before stated, prays that there be an account whether said bonds and mortgage are valid obligtions of said railroad company; or whether any and what of said bonds, if any, are valid, and what, if any, amounts are required to redeem said property and the terms thereof.

Said Rose petition also alleges that said Quigley and his associates caused to be turned over to themselves, or them-

selves got possession of certificates for 4,150 shares of the said preferred stock by fraud, and that said 4,150 shares were never duly issued by said railroad company, and should be held to be not issued, and should be directed to be canceled. (Pr. Trans., Vol. 1, p. 557.) And that said Quigley fraudulently and falsely pretends to be the holder and owner of said 4,150 shares, and that other pretended holders of the same or some part thereof, if any, are among the associates of said Hamlins who are in the petition of said Hamlins alleged to be acting in concert with them, and that such Quigley, as such pretended holder, is a member and chairman of said alleged committee of preferred shareholders in said cross-bill of said Hamlins mentioned. (*Id.* 573.) And among the relief prayed by Mr. Rose is that there may be an account as to who are holders of preferred stock and what stock is held, and that said 4,150 shares of preferred stock be held not to be outstanding and the certificates thereof be cancelled. (*Id.*, 574.)

8. *Motions of Rose upon his petition.*

Thereupon you petitioner, Rose, having filed the said petition on November 22 1897, within the time prescribed by said order of October 23, 1897, moved the court (1) that the Continental Trust Company, the said railroad company, Stout, Purdy, and others, parties to said suit, be ruled to plead, answer or demur to said petition; (2) that said petition be ruled to stand as an answer to the bill of the Continental Trust Company and Butler; (3) that the evidence theretofore taken, so far as competent, material and relevant, stand and be read upon the said petition of said Rose and upon the issues made thereon; (4) that such order be made as to the tak-

ing of further evidence upon the said petition and the issues thereon as should be in accordance with the rules and practice of the court and be proper; and that proper orders be made. (Print. Trans., Vol. I, pp. 575-6.)

9. *The Continental Trust Company, trustee, and the committee of bondholders filed their claims as creditors on the bonds; and petitioner Rose filed objections thereto.*

After the entry of the above order of October 16, 1897, requiring the special master therein to give thirty days' public notice by advertisement according to the course and practice of court, to all creditors of said railroad company, and requiring them on or before December 1, 1897, to file before him their claims, and notifying all persons interested that all creditors failing to comply with said notice or to prove their claims within that time would be excluded from any decree of distribution under said creditor's bill (Print. Trans., Vol. I, p. 484), the said Continental Trust Company, claiming to be trustee under said mortgage (the complainant in said bill theretofore filed and pending to foreclose said mortgage), on November 30, 1897, filed its claim with the said special master based upon the said bonds in accordance with the said order of October 16, 1897; and therein claimed for the principal of the said bonds amounting to $9,000,000 and the semi-annual interest of $540,000 for each six months to June 1, 1897, amounting to $4,860,000, and for interest upon each of said installments from the said dates to maturity thereof at six per cent. per annum, and for interest upon said sum of $9,000,000 from said June 1, 1897, at the rate aforesaid (*Id.*, Vol. 2, pp. 3767-8). And the said bondholders' committee also upon the same day filed their claim upon the bonds alleged to have been deposited under

the bondholders' agreement, amounting to the sum of $8,303,000, and for interest upon said bonds for each six months up to June 1, 1897, amounting to $2,241,810, and for interest upon each of said installments of interest from the dates of maturity thereof at the rate of six per cent. per annum, and for interest upon said sum of $8,303,000 from June 1, 1897, at six per cent. per annum. (*Id.*, pp. 3757-8.)

The above claims of the Continental Trust Company, trustee, and of the bondholders' committee are the same claims and alleged causes of action set forth in the bill of foreclosure of the Continental Trust Company theretofore filed as aforesaid, and which are also set forth to the extent of the bonds alleged to have been deposited under the said bondholders' agreement in the said intervening petition of the said bondholders' committee so theretofore filed for leave to intervene and become parties to the said creditors' suit, and upon which petition the said bondholders' committee were theretofore, on November 20, 1893, made and became parties to the said creditors' suit. (*Id.*, Vol. 1, pp. 20–27.)

Thereupon, after the filing of the said claims of the said Continental Trust Company, trustee, and the said bondholders' committee, with the said special master under the said order of the court of October 16, 1897, your petitioner, Dana A. Rose, on January 11, 1898, filed his certain objections to the claim of the said Continental Trust Company, trustee, and also his certain objections to the said claim of the said bondholders' committee so filed as aforesaid, in and by which objections your petitioner, Rose, set up and stated and charged his defenses and objections to the said claim, as in and by his said objections is set forth. (Print. Trans., Vol II, pp. 3821–32, 3832–44.)

10. *Decretal order of Circuit Court denying petitioner Rose's motion, and striking out his petition and also striking out his objections to the claims of the Continental Trust Company and the bondholders' committee.*

Thereupon, afterwards, on April 1, 1898, the court entered its order reciting that said cause came on to be heard upon the motions so made by said Rose, on December 7, 1897, and the court having heard the arguments of counsel, and ordered that said motion of said Rose be denied; that the said paper writing so filed by said petitioner Rose be and the same was stricken from the files; that the application of said Rose to become a party thereto, and to file his said intervening petition as an answer and intervening petition be denied. And said order further recited that said Rose having heretofore filed with the special master herein his certain objections to the claim of the Continental Trust Company filed with said special master, and also his certain objections to the claim of the bondholders' committee filed with said special master, it was ordered that said objections of said Rose be, respectively, stricken from the files and stricken out. (Print. Trans., Vol. II, pp. 3917-18.)

Thus your petitioner, Dana A. Rose, although required by the order of October 23, 1893, to become a party, was refused the right to be heard, and his defenses and claims, the presentation of which was not only invited but was directed, were stricken out.

11. *Appeal of Mr. Rose and determination thereof by the United States Circuit Court of Appeals.*

Thereupon your petitioner, Dana A. Rose, prayed and was allowed by the said Circuit Court and perfected his appeal from the said decretal order of April 1, 1898, to

the United States Circuit Court of Appeals for the Sixth Circuit. (*Id.*, 3918) And therein said Rose duly assigned for error that the decretal order denying his said motion was erroneous; that the court erred in not granting the said motion; that the court erred in entering said order striking the said petition of said Rose from the files; that the court erred in striking from the files and in striking out the objections of said Rose to the said claim of the said Continental Trust Company, and that the court erred in striking from the files and striking out the objections of said Rose to the said claim of the said bondholders' committee. (*Id.*, 3919-20.]

Thereupon, afterwards, at the October term, 1898, of the said United States Circuit Court of Appeals for the Sixth Circuit, your petitioner, Rose, by his counsel, appeared upon said appeal and presented and filed his argument in support of said appeal and the said assignment of errors, in accordance with the rules of the said last mentioned court.

That such proceedings were had in said United States Circuit Court of Appeals upon the appeal of the said Rose that afterwards, on July 5, 1899, said last named court filed its certain opinion, in and by which opinion it was ruled and held that

"The petition or so-called answer and cross-bill of Dana A. Rose was properly dismissed. He was not party to it, but filed a verbose and belligerent pleading without leave of court. Rose is a holder of preferred stock. The Hamlins, representing a majority of that stock, were suffered to become parties defendant to the foreclosure bill as representatives of the class. The facts and reasons permitting that intervention appear in the opinion of this court in 47 U. S. App., 422; 24 C. C. A., 271, and 78 Fed., 664. When Hamlin's appeal had resulted in his

reinstatement as a party the Circuit Court directed the master to make publication, directing all holders of preferred stock certificates like those set in Hamlin's answer and cross-bill, to appear and become parties complainant to the representative cross-bill filed by Hamlin and others. Rose was not content to have himself made a cross-complainant with the Hamlins, as permitted by the order recited. Desiring to present his claim in his own way, and upon his own view of the facts, he declined the invitation extended, and filed a pleading which purported to be an answer to the foreclosure bill and cross-bill. * * * There was no authority for Rose's admission as a party, save as a co-complainant with Hamlins. He did not choose to avail himself of that privilege. He consequently was never a party to the suit, except in so far as he may be bound by a decree through representation by those having the same interest and admitted as representing the class. This gave him no independent status as a party. The right to file his stock and prove it up before the master, if he had this right at that stage of the case, with the rights incident to such an appearance, is a right of which he did not avail himself. Rose says he could not adopt the pleading filed by the Hamlins. The averments of his own pleadings show that he was not one having a common interest with the body of preferred shareholders. If he wished to contest the validity of the lien claimed by such stockholders, or the validity of some of the certificates, the Hamlin interest afforded him no field and extended him no invitation. He should have sought admission as an independent defendant. This he did not do, unless the unauthorized filing of his pleading be regarded as an application for leave to intervene. If so, it was denied him. From a decree refusing leave to intervene and become a party, no appeal lies. *Ex parte* Cutting, 94 U. S., 14. We entertained Hamlin's appeal because, after being admitted as defendant, he was excluded upon the ground that his intervention was without merit. The decree would have concluded him in another suit. His remedy was by appeal. Not so with Rose. He was never admitted as a party. He had the right to come in as a co-complainant with Hamlin. That he did not do. His appeal must be dismissed." (Printed Trans., Cir. Ct. of App., ~~pp. 47, 48.~~) Tr. 3 pp 2015-16)

And thereupon the said United States Circuit Court of Appeals entered its judgment upon the said appeal of your petitioner Rose, affirming the decree of said Circuit Court. (*Id.*, pp. ~~12~~ 3969-70)

Thereupon your petitioner, conceiving himself to be aggrieved by said judgment last mentioned, duly presented to the said court his petition for rehearing in accordance with the rules of said court (*Id.*, pp. ~~49-51~~); 4017- upon consideration whereof, the said court filed its further opinion, and therein held and ruled:

"The contention of petitioner Rose that his fourth and fifth assignments of error have not been passed upon is erroneous. The assignments referred to are to the action of the court in striking out his objections filed to the claim of the Continental Trust Company and of the committee of bondholders filed in the administration suit. Rose's objections were filed in his character as a holder of certain shares of preferred stock. He was not a party, save as represented either by the corporation, or Hamlin and others as representing the preferred shareholders as a class. We held, upon grounds not necessary to be restated, that he had no status as a party with the right to assert independent defenses either by way of cross-bill or otherwise. His answer to the Hamlin cross-bill and his cross-bill were filed without leave of the court, and his application to become an active party defendant to the Hamlin cross-bill was denied. This denial was not subject to appeal. The mere fact that he was a stockholder gave him no right to appear and defend either the administration suit, the foreclosure suit, or the Hamlin cross-bill. The corporation represented the general stockholders, and leave was granted preferred stockholders to present their rights and make general defense through Hamlin and those who should become complainants with him as a class representing the whole class of preferred stockholders having rights common with Hamlin. Rose declined to make himself a co-complainant with Hamlin as he might have done under the order of the Circuit Court, and was, therefore, not entitled to pre-

sent his individual objections to claims filed in either of the suits. When an order shall be made directing all holders of preferred shares to present their stock for participation in the fund which may be going to that class of stockholders, a very different question may arise if he shall then before the master present objections to preferred stock presented by others for participation in the fund going to such shareholders as a class. That question we have not passed upon, and do not now pass upon. It is sufficient to say that his interest as a shareholder did not justify his claim that each and every shareholder might severally contest claims filed against the corporation.

The petitions are dismissed." (Print. Trans. Cir. Ct. App., pp. ~~56-57.~~ 404-455)

And thereupon the said Circuit Court of Appeals entered its order denying the said petition for rehearing of said Rose. (*Id.*, p. ~~85.~~ 453)

III.

THE QUESTIONS PRESENTED BY THIS APPLICATION FOR CERTIORARI.

1. *Was Mr. Rose interested and a necessary party? Did he have a right to appear and defend?*

The Circuit Court of Appeals for the Sixth Circuit on the said appeal of the said Hamlins ruled and held in its said opinion, as a construction of the said certificates of preferred stock, that:

"The clear purpose of the provision of said certificates making this stock a lien second only to the existing first mortgage is to secure to it a preference over the common stock, not only in respect to a limited dividend, but in the ultimate return of capital to those who contributed to it;" and that although the appellants, Hamlins, were not creditors proper, "yet they show a case, on the face of their certificates, entitling them to a

preference over common stockholders in relation to both dividends and capital;" and that "what we decide is that, although appellants are not creditors, they are entitled, on the averments of their answer, to a preference, in relation to the capital of this corporation, over common stockholders, and that upon the averments of their answer they were at least proper parties defendant, having a substantial interest antagonistic to the common stockholders, and therefore not to be properly represented by the corporation. It is a case in principle like that of a common trustee in conflicting mortgages. Such a trustee cannot represent antagonistic rights of contending classes of lienors. When that is the case each class must be allowed representation."

On April 1, 189-, the Circuit Court entered a decree of foreclosure and sale upon said foreclosure bill, adjudging that the said bonds and mortgage are valid, finding the amount due thereon $12,028,500, and decreeing the sale of said property to pay the same in default of payment by said railroad company of the amount due within sixty days after the entry of said decree, and decreeing the payment of the proceeds (after payment of certain claims adjudged to be prior) to the payment of the principal and interest of said bonds, and said decreee contemplates that the purchase price may be, to some large extent, paid by the use of said alleged bonds. (Pr. Trans., Vol. pp. 3903-18.) And by a modification of said decree made May 16, 1898, upon the said Hamlin's cross-bill, the holders of said preferred stock have a priority over common stockholders not only in payment of dividends but also in the distribution of the assets, remaining after the payment of all debts, and therefore said preferred shareholders or any of them may ~~default~~ deposit in partial fulfillment of any bid which they may make at the sale ordered herein, shares of the said prefered stock of said railroad companies, provided such stock shall not

be so received for this purpose until the holders thereof shall have paid into the registry of the court a sum upon their bid in cash sufficient to satisfy all the costs and expenses of suit and sale, receiver's debts, mortgage debts, and all debts claims for which have been filed either in this foreclosure proceeding or under the creditors' bill consolidated herewith, with interest to the day of distribution, as said debts have been or shall be hereafter adjudicated either under the foreclosure bill or the creditors' bill herein; and provided said preferred stock thus deposited shall be received to pay only that part of the surplus so bid after payment of debts which these owners would be entitled to receive on their shares in the distribution of the surplus money or holders of the entire issue of said preferred stock. (Print. Trans., Vol. II, p. 394.)

Thus the Circuit Court recognized that the holders of preferred shares had rights and interests in the property to be sold or its proceeds, which, so far as the right to be heard on their own behalf was concerned, were similar to and not different from the rights of creditors holding liens subordinate to the first mortgage, or at least creditors having the right herein to defend against the validity of the first mortgage and the bonds purported to be secured thereby. Under this status of holders of certificates of preferred shares thus recognized by the ruling of the United States Circuit Court of Appeals on the Hamlin appeal, and here in the decree by the Circuit Court, the holders of preferred shares were entitled to have precisely the same standing in this litigation to defend against the validity and amount of the mortgage indebtedness as subsequent lien-holders or creditors have. Yet that right or

any right on the part of Mr. Rose to present his defense to said bonds was absolutely denied him.

The Circuit Court of Appeals, upon the appeal of the Hamlins, carry this even further than the decree of the Circuit Court and modified the decree accordingly, and in so doing laid down principles which it is respectfully submitted should have had a potent application (but which were not applied) to the case presented by Mr. Rose. The Court of Appeals held that the decree should be so modified as to reserve a lien upon the railroad in the hands of the preferred stockholders as purchasers only for the payment of such debts of the railroad company as have been or might be established under the pending creditors' suit, and to allow such purchasers to intervene and contest all claims therein pending. (Print. Trans., Cir. Ct. of Ap., being Vol. III, Opinion, pp. ~~43 to 47.~~) In so holding the Circuit Court of Appeals holds and rules that the property and assets of the defendant railroad company are to be administered herein as if the said railroad corporation were dissolved. In the opinion it is said:

"The difficulty arising out of the fact that a technical dissolution of the corporation has not occurred and will not result from the sale of the corporate property is, in our judgment, met by the fact that that which will result will amount to a *de facto* dissolution. Under such circumstances, a court of equity is justified in administering the assets of the corporation as if a legal dissolution had occurred. * * * A court should, in the administrative case, exercise the jurisdiction arising out of the fact that a *de facto* dissolution has occurred, and on that basis has retained, as in *Cramer* v. *Bird* (L. R. 6 Eq., 143), whether any debts and liabilities remain unpaid. For this purpose it would be proper for the Circuit Court to cause publication to be made requiring all creditors to file their claims within a reasonable time, to be prescribed by the court, and to establish the same before the mas-

ter. After providing for the payment of debts so ascertained it will be the duty of the court, no debt remaining unpaid, to declare a final distribution of the capital among the shareholders who, for this purpose, should file their certificates with the master.

The decree of foreclosure will be so modified as to reserve a lien upon the railroad in the hands of the preferred shareholders as purchasers, only for the payment of such debts of the Toledo, St. Louis and Kansas City Railroad Company as have or may be so established under the pending creditors' suit, and allowing such purchasers to intervene and contest all claims therein pending." (*Id.*, ~~15 47.~~ 4013-15)

This holding emphasizes our position that Mr. Rose should have been recognized as a party and been allowed to defend, and places the case within the ruling of this court in *Graham* v. *Railroad Co.*, 102 U. S., 148, and *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S., 383, that when the corporation is insolvent and so civilly dead, its property is to be administered in this suit as a trust fund for the benefit of its stockholders as well as its creditors; and so, not the corporation, but these preferred shareholders themselves could alone and should be permitted to represent their own interests.

2. *Did the order of October 23, 1897, and Mr. Rose's appearance thereunder give him a right to be heard as a party?*

The order of October 23, 1897, called upon, and so required, "all other holders of the preferred stock certificates like those set up in this cause by the Hamlins" to appear in the case. (Print. Trans., Vol. I, p. 493.) The purpose of that requirement, it is submitted, was to make it compulsory on them to appear or be bound, and to bind the holders of such certificates who should fail to appear by the decree in the case which

might be entered. The purpose was the same as that which prevails in creditors' suits, and it was recognized by the Circuit Court in this case, by publishing notice to creditors to appear and present their claims. The rights of preferred shareholders, as settled by the decision of the United States Circuit Court of Appeals on the appeal by the Hamlins, recognized them as having such rights in the property and assets of the railroad company, prior to that of the common stockholders, as were not represented by the railroad company, such rights as the preferred shareholders themselves could only represent. They had, then, we submit, the same right to present their own defenses and claims as other persons, creditors or owners of the equity of redemption might have.

It is suggested that this was plainly recognized by the order of October 23, 1897, calling upon them to appear, the object of which, as stated, was to cut them off or bind them by the decree and disposition of the assets which should be made. As Rose was required to appear under the penalty or condition that if he did not his rights would be adjudicated and disposed of in his absence, we submit that he plainly was given and had by and under that order of October 23, 1897, the correlative *right* to appear and be a party. That his mere appearance made him a party to the case, with the rights of a party. Those rights were to present his own case and defend against the bonds and mortgage by pleadings and by evidence and argument and to have the same heard. The limitations of the order of October 23, 1897, that the other holders of preferred stock should be made parties complainant with said Hamlins in the representative cross-bill filed by said Hamlins, did not,

we beg to submit, require Mr. Rose to adopt in every respect and to limit himself strictly to the allegations, denials and defenses and evidence presented by the Hamlins. That was not the proper construction of that order. Upon Mr. Rose's appearing under that order it is submitted that he had a right to a proper construction of that order, and that a proper construction of that order permitted Mr. Rose to adopt the allegations and provisions of the Hamlin cross-bill so far as he might, and to vary therefrom and present his own allegations and defenses in other respects as he might be advised.

But if the limitations of the order of October 23, 1897, were intended to be so rigid as the honorable Circuit Court and Circuit Court of Appeals have held them to be, namely, that Mr. Rose should, in all respects, adopt and strictly confine himself to the allegations, charges and prayer of the Hamlin cross-bill, then we respectfully beg to maintain that such limitations were beyond the power of the court to impose; and that Mr. Rose, *being required* to appear, *had the right* to appear, and upon appearing to present in proper form his own case. It is submitted, however, that the gist of the provision of the order of October 23, 1897, requiring Mr. Rose to appear and be made a party complainant with said Hamlins in their cross-bill, was the requirement to appear. It is submitted that the order and the notice thereby given, when Mr. Rose presented himself, entitled him to appear without any further order of court. It is submitted that when Mr. Rose had so appeared, as he did, then he became a party to the cause. It is submitted that it was no longer the case of closing the door to an applicant for admission; but of expelling one who had already been properly admitted, and who had the right to be there; and that by

expelling him and closing the door, as was done, and refusing him any hearing or to regard him as a party in the cause, was violative of the fundamental principles which underlie and sustain all judicial proceedings and the power of courts to adjudge and determine the rights of parties.

3. *Does the decree purport to bind Mr. Rose in his private property right? Did this not give him the right to defend?*

The Circuit Court, in its opinion on Mr. Rose's appeal, strongly intimates, if it does not expressly hold, that Mr. Rose is bound by the decree, because of the representation of him by the Hamlins herein. And the decree of the Circuit Court of foreclosure and sale and the judgment of affirmance thereof by the Circuit Court of Appeals proceed on the ground that Rose and all persons interested are bound thereby. It is submitted that there is no such doctrine or principle in judicial proceedings as such involuntary representation, where there exists in the case no contract or other authority on which it is based, so that one of a class, without any such contract or authority, may by his allegations, pleadings or case, represent and bind strictly to his showing, pleadings and case another of that class so as to bind his private property right against such other's will or without such other's consent. Much less does any such rule of representation go so far that such other person of this class when required by the order of the court to appear and when he has appeared, cannot of right present his own case, but must, if the court so wills, submit to be bound as to his own private property right by such allegations, pleadings, evidence, arguments and case as such voluntary representatives may present.

It is submitted that representation by one of a class or for a class, which will bind all of the class as to the private property right of each, in their absence, must be based upon some actual authority from such others. For instance, the binding representation by the trustee in a railroad mortgage of the bondholders is because that is authorized by contract.

4. *Is the ruling refusing Mr. Rose's right to be heard and still adjudging his rights as if he were a party and were heard, in conflict with Equity Rule 48 and decisions of this court?*

It is submitted that the ruling of the Circuit Court of Appeals sustaining the ruling of the Circuit Court, with respect to Mr. Rose, was not sustained by authority and was in conflict with rule 48 of the equity rules, which permits the court to dispense with persons interested as parties, only where they "are very numerous and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it," but provides that then "the decree shall be without prejudice to the rights and claims of the absent parties," and is also in conflict with several decisions of this court to which we will refer in our argument in support hereof.

4. We beg to submit that the action of the Circuit Court, which was affirmed by the Circuit Court of Appeals, in striking out the objections filed by Mr. Rose on his own behalf and on behalf of the other holders of preferred shares to the claim filed by the Continental Trust Company as a creditor based upon the said bonds, and his objections to the claim of the bondolders' committee based upon the bonds alleged to have been deposited under their agreement, which claims were filed before the

master in pursuance of the order of October 16, 1897, requiring creditors to present their claims on or before December 1, 1897, was erroneous and denied to petitioner a substantial right.

It is submitted that the presenting of these claims before the master in the general creditors' administration suit was an abandonment of the bill to foreclose for the same which had been previously filed. It is submitted that the presenting of these claims in the creditors' suit opened said claims to defenses of all persons who were interested in the property in course of administration in that suit, and who were interested in defending against and defeating said claims. We respectfully maintain that Mr. Rose was such person.

We respectfully suggest that the action of the Circuit Court and of the Circuit Court of Appeals in denying to Mr. Rose the right to object and defend against these claims is not consistent with the ruling laid down by the Circuit Court of Appeals in its opinion in this case on the Hamlin appeal from the final decree of foreclosure, to the effect that the railroad company is to be treated in this suit as having been in fact dissolved, and that the court was "justified in administering the assets of the corporation as if a legal dissolution had occurred," and is in conflict with the rule laid down in the case of *Graham* v. *Railroad Company*, 102 U. S., 148, and *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S., 383, that the property of this railroad company is in such a suit to be administered as a trust fund for the benefit of its stockholders and creditors.

It is suggested that this ruling denying Mr. Rose the right to contest these claims is not consistent with the ruling of the Circuit Court of Appeals in this case as to

the status, with respect to the property and assets of the railroad company, of the preferred shareholders, namely, that the preferred shareholders are entitled to a preference in the distribution of the surplus assets of this company next after the payment of its debts.

We beg to urge that under the order of October 23, 1897, above mentioned, notifying the other holders of preferred shares than the Hamlins to appear, Mr. Rose did in fact appear within the time limited by that order; and that thereby he became a party to the suit; and that being a party, he then had the right to contest the claims of the Continental Trust Company, trustee, and the bondholders' committee, when they were so proffered before the master by them as creditors of the railroad company.

5. It is submitted that it will not do, in answer to the claim of Mr. Rose for the right to appear and be heard, to say that all his contentions were fairly heard upon the pleadings and case of other parties. That would be no answer to the right of Mr. Rose to appear on his own behalf, if it were true. But in fact Mr. Rose in his intervening petition, which was submitted also as an answer and cross-bill, presented substantial claims and contentions which were not presented by any other party. And other contentions which were presented by the pleadings of other parties as well as upon that of Mr. Rose, which he might and would present if he were given the opportunity, were not urged by such other parties or assigned for error in the Circuit Court of Appeals.

It is, however, sufficient here to show that this case was heard and determined in the absence of Mr. Rose, on the basis, however that the rights of Mr. Rose were to be and were adjudged and bound by the decree, as if he

were a party, while Mr. Rose was denied the status of a party, and the right, which he sought and contended for, of being heard.

6. *If Mr. Rose was entitled to object to the claims of creditors filed in the creditors' suit and the court was in error in striking out his objections, could the court properly decree foreclosure and sale and distribution to bondholders, without hearing the issues on said claims and objections of Mr. Rose?*

We beg to suggest that notwithstanding these facts, viz., (1) that the bondholders' committee, who claimed to represent 8,303 of the 9,000 bonds of said railroad company (Print. Trans., Vol. II, p. 3758), appeared in said creditors' suit and on their own request were made parties thereto (*Id.*, Vol. I, p. 26 27), (2) that in the foreclosure suit there was not the requisite diversity of citizenship to sustain the jurisdiction of that suit as an independent suit, but such jurisdiction could only be sustained, if at all, on the ground that such suit was a dependent suit, and (3) that said foreclosure suit and said creditors' suit were consolidated, and (4) the further fact that afterwards the Continental Trust Company, trustee, and the bondholders' com mittee presented and filed their claims based upon said bonds, as creditors of said railroad company in the said creditors' suit,—yet the Circuit Court in its hearing and decree treated the said foreclosure suit as if it were an independent suit, to which only the persons who were originally named therein were parties, and as if the creditors' suit did not exist.

The Circuit Court in its final decree of April first, 1898, recites that said case came on to be heard upon the bill of complaint of the Continental Trust Company and

Butler, and upon the answers thereto of the respective respondents, upon the replications to said answers, and upon the answer to that bill and cross-bill of the Hamlins and the replication to said answer, and upon the answer to said cross-bill and the replication thereto, and upon the amending intervening petition of certain creditors (who were permitted to intervene in said foreclosure suit) and the answer thereto. Nothing is said in that decree of the creditors' bill or suit of Stout and Purdy or of the issues made up in that suit. Nothing is said of the fact that the Continental Trust Company, trustee, the surviving complainant in the foreclosure bill, and the bondholders' committee had shortly before said hearing filed in the said creditors' suit their said claims as creditors of said railroad company based upon the identical bonds which were sought to be enforced in said foreclosure bill theretofore filed; nor of the fact that divers parties, who were creditors of said railroad company and parties to said creditors' suit, but who were not named as parties in said bill to foreclose, had filed objections to the said claims of the said Continental Trust Company and the bondholders' committee; and that those issues were undisposed of. For instance, at the time of the entry of said decree of foreclosure and sale there had been filed and stood undisposed of objections to the said claims of the Continental Trust Company and the bondholders' committee upon the said bonds by Charles Miller (Print. Trans., Vol. II, p. 3803, 3808), George M. Thornton (*Id.*, Vol. II, p. 3805, 3811) and by F. J. Sawyer (*Id.*, p. 3805, 3812). It will be observed that the Circuit Court proceeded to enter a decree of foreclosure and sale and therein adjudged these bonds to be valid, and the proceeds of the property to be applied to

their payment, without hearing or disposing of the said issues as to the validity of the said bonds which were raised and then stood undisposed of by the said objections of Miller, Thornton and Sawyer.

It is suggested that after the Continental Trust Company, complainant in the foreclosure suit, and the bondholders' committee had thus presented their claim and proffered their bonds as a claim against the Railroad Company in the creditors' suit, and invited objections thereto, and such objections were properly filed by creditors of the railroad company, the complainant in the foreclosure suit could not any longer procure a decree upon the said foreclosure bill, as if it were an independent suit, and as if the complainant therein had not so invited the defense against its claim and bonds, and without first or at the same time disposing of or hearing the issues so then outstanding as to the validity of the bonds on the part of these creditors.

If, as we maintain, Mr. Rose had the right to file his objections, then his objections to the validity of the bonds also remain undisposed of on their merits. He is the holder of six hundred shares of preferred stock of this railroad company of the par value of $600,000, and is interested to get as much upon that stock from the surplus assets of this corporation as may be made to result from the defense of illegal and invalid claims. It is submitted that he is vitally interested and affected by a decree adjudging the validity of the bonds, directing the sale of the property and the distribution of the proceeds to the holders of the bonds, while valid and living issues properly presented as to the validity of those bonds are ignored and left unheard.

7. We beg respectfully to suggest some questions decided by the Circuit Court and the Circuit Court of Appeals in favor of the complainant, erroneously as we conceive, upon such decision of which the said decree of foreclosure and sale depended. Mr. Rose is vitally interested in the proper decision of such questions, for the reason that by such decree the property of said railroad company to which alone he may look for any share of its assets in the administration of this trust, was disposed of without according to him any hearing and without determining pending issues involving the validity of the mortgage indebtedness.

(1) The question of jurisdiction of the foreclosure bill. Was the bill of foreclosure of the Continental Trust Company and Butler, trustees, an independent bill? If so, and its jurisdiction depended upon diverse citizenship, such jurisdiction was utterly lacking. The complainant, the Continental Trust Company, was a citizen of New York, as were the defendants thereto, Stout and Purdy, Canda, Harbeck, Bache and Adams. (Print. Trans., Vol. I., pp. 32–33). John M. Butler, one of the complainants, was a citizen of Indiana, as was the defendant railroad company. (*Id.*, p. 32.)

It is submitted that the fact that the creditors' suit of Stout and Purdy was pending, and a receiver of the property of the railroad company had been therein appointed and possession taken by said receiver of the court, did not make it necessary that the foreclosure of the mortgage should take place in the same court, if the foreclosure could be secured by an original bill. It would have been competent for the complainants to have foreclosed their

mortgage in the state court, if the pendency of the creditors' suit permitted a separate original bill of foreclosure to be maintained at all. The right of a party to invoke the jurisdiction of the Federal court on the ground that the subject is in the jurisdiction or possession of the Federal court, is limited to cases of necessity. It is submitted that there was no jurisdiction of this suit to foreclose, as an independent suit. And that it was brought as an independent suit there can be no question. The statement in the opinion of the Circuit Court of Appeals that the suit was brought in the Federal court by leave of that court first granted is an error. The complainant did not apply for leave to bring that suit in the Federal court, but for leave to make the receiver of the Federal court a defendant, which might as well have been granted if the suit had been commenced in a state court. (*Id.*, p. 31, 32.) The bill was brought as an independent suit. This appears to be conceded by the Circuit Court and Circuit Court of Appeals in their opinion. (Pr. Tr., Vol. 3, p. 3980.) A separate order appointing a receiver was entered thereon as if there were no receiver appointed. (*Id.*, Vol. 1, p. 61-63.) The case was then consolidated with the creditors' suit, precisely as if they were separate and independent suits. The bill of foreclosure therefore was without jurisdiction.

If the foreclosure bill was or could be regarded as dependent for its jurisdiction on the creditors' suit, then it was an intervention in that suit and all parties to that suit become parties thereto and had the right to defend.

The creditors' administration suit was ample to protect and enforce the right of every person in or to the property and assets of the railroad company. The court, in that suit, had taken jurisdiction and possession for that entire purpose. If the mortgagees desired to avail themselves of the fact that the mortgaged property was within the jurisdiction and possession of the Federal court, as a reason or ground for invoking the jurisdiction of that court to enforce the mortgage lien, we beg to maintain that such invoking of Federal jurisdiction is and must be *in the pending creditors' suit*. The bill to foreclose, then, became a part of the creditors' suit. The court had already sequestrated the property for the benefit of all the creditors and stockholders in order to administer the property and assets of the corporation as a trust fund for the benefit of all the creditors and stockholders under the rule laid down in *Graham* v. *Railroad Company*, 102 U. S., 148, and *Hollins* v. *Brierfield Coal and Iron Co.*, 150 U. S., 383. There was, as said in the *Hollins case*, "a trust in the administration of the assets after possession by the court of equity." The bill of the mortgagees, then, became an application to the Federal court administering this trust, to establish the rights of the mortgagee under that trust and in the course of such administration thereof.

Then every creditor of the railroad company, for whose benefit the said trust was being so administered, and the preferred shareholders of said company who had the next right to the assets upon distribution after claims of

creditors should be satisfied, had the right as beneficiaries of the trust to defend against and contest the validity of the mortgage bonds and the claims of the mortgage trustee and bondholders, under the rule laid down in *Galveston Railroad* v. *Cowdrey*, 11 Wall., 478.

It is, with much respect, suggested that the court below and the Circuit Court of Appeals failed to regard these principles, and treated the foreclosure bill as being dependent merely for the purpose of sustaining the jurisdiction thereof, in the absence of any diversity of citizenship or Federal question or other ground of jurisdiction; and then treated said foreclosure bill as being in every respect an independent bill, to be dealt with and disposed of as a suit merely between the parties named therein, in which neither creditors nor preferred shareholders of this *de facto* dissolved corporation had any concern, and as if the said creditors' suit did not exist.

(2) The question of consolidation and its effect. The consolidation of the cases marks the fact that the foreclosure suit was brought as an independent suit. If brought as a dependent suit then it was an appeal to the jurisdiction which the court was exercising in the creditors' administration suit—and the consolidation was unnecessary and futile. But the consolidation of the independent foreclosure suit with the creditors' suit could not aid the jurisdiction of the foreclosure suit which was lacking when it was brought. The Circuit Court and the Circuit Court of Appeals thought it might. It was there conceded that the bill of foreclosure "was apparently filed as an independent bill." (Print. Trans., Vol.

III, p. 3980.) But it was there thought not only that the court might, but that it was the duty of the court, if necessary to maintain its jurisdiction, to treat it as a dependent bill, ancillary to the creditors' action. We respectfully maintain that this was error. But, as above shown, if it be treated as such, then it invoked the jurisdiction in that creditors' suit—was an intervention, and all parties to the creditors' suit had the right to defend.

But the court on the other hand, having treated the bill as ancillary or dependent only in order to sustain the jurisdiction, then treats it as entirely independent for the purposes of the parties and relief. And says:

"Because the *res* acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect to the *res*, parties to the original bill are not thereby made parties to the dependent bill. Parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof." (*Id.*, p. 12.)

It is submitted that this is erroneous; that it is not the *res* that gives the ancillary jurisdiction. It was the *possession* of the *res* in the creditors' suit and the *existing exercise* of the jurisdiction over the *res* in that creditors' suit for the purpose of establishing and enforcing the morgagee's and all others rights in the *res*, that gave the right to a party having a claim upon the *res* to appeal to that existing exercise of jurisdiction. The scope and purpose of the creditors' suit was to ascertain and dispose of all rights and claims of right, liens and priorities in or to the *res*. When the

mortgagee applied to the Federal court having that existing jurisdiction in a creditors' administration suit, that application was for the exercise of the jurisdiction in that creditors' suit, whatever the form of that application might be.

But if the foreclosure bill as to the parties and the relief was independent, still the effect of the consolidation was to make of the two one suit. It is conceived that the Circuit Court of Appeals was in error in holding that the consolidation was but an expedient adopted for saving costs and delay, and that each record is that of an independent suit; and that the consolidation does not change the rules of equity pleading nor the rights of the parties; and that the parties in one suit do not thereby become parties in the other; but that it operates as a mere carrying on together of two separate suits (*Id.*, 3981). It is submitted that the effect of the consolidation was to merge the foreclosure suit into the creditors' suit or to make of the consolidated suit a creditors' administration suit. The fact that the title of the foreclosure suit was retained was a mere matter of convenience. A railroad foreclosure suit may be a creditors' administration suit, in which a simple contract creditor may intervene. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S., 371, 379.

(3) If Mr. Rose had been permitted to intervene he would have maintained and might well have maintained upon the record that the right to declare the principal of the bonds to be due and to foreclose therefor, which was put in issue on his petition, was not shown. We are not permitted to argue this. It is enough to say that this is a matter of

strict right, somewhat in the nature of forfeiture, and is to be strictly and sufficiently proven. And that the evidence here by which it was sought to be shown was an alleged declaration by the bondholders' committee (Print. Trans., Vol. 1, 782, 783), who did not own the requisite one-half of the bonds, but who professed to act for others who were holders and whose authority is not shown. Their alleged authority is merely the alleged bondholders' agreement (*Id.*, 740 to 757), the proof of the execution of which or of the ownership of the bonds by the alleged signers thereof was not shown. Said alleged agreement is an agreement purporting to be under seal, and purports to be signed, not only by individuals whose signing or signature or whose ownership of bonds is not proven, but by firms, by estates without any personal signature thereto, by trustees, excutors, attorneys and agents without any showing of authority, by corporate names without the signature of any officer or corporate seal, and without any competent or adequate proof of the execution. (*Id.*, Vol. 1, p. 734 to 781.)

IV.

THE QUESTIONS HERE RAISED AND THE CASE ARE OF GRAVITY AND IMPORTANCE.

That your petitioner is advised by counsel and submits that the questions above suggested and here involved are of such gravity and importance that this court should review and pass upon the same and for that purpose should grant a writ of *certiorari*.

The petitioner is advised and submits that the question

of the rights and interests of this petitioner in and to the property and assets of said railroad company in course of administration in said suit and his contention that he was a necessary party to said administration suit is one of gravity and importance.

That the right of the petitioner as the holder of six hundred shares of said preferred stock, upon which he is entitled to receive the proceeds and assets of said railroad company next after the payment of debts pro rata with other holders of preferred shares, to be heard in the said cause as to the validity of the alleged bonds, debts and claims against said property, and the denial of such right, presents a question of grave importance.

That the right of said petitioner under said order of October 23, 1897, requiring him to appear in said cause, when he did so appear, to present his claims, contentions and case and his defense to said foreclosure suit and bonds, which right was denied him, presents a question of gravity and importance.

That the question of the power of the court to deny him the right of being heard herein, and yet to proceed and adjudge his rights, and to decree the sale of the property of said railroad company and the disposition of the proceeds thereof in his absence, and to affect and bind him and his rights to private property by said decree in his absence, presents a question of gravity and importance.

That the question of his right, as the holder of six hundred shares of said preferred stock, upon which he is entitled to a priority in the distribution of the property and assets of said insolvent railroad company over the common stockholders and next after the creditors of said company, to object to and defend against the claims of

creditors, and particularly the claims of the holders of said pretended bonds of said railroad company, presented in said creditors' suit, is a question of gravity and importance.

That the question of the jurisdiction of said Circuit Court in the said foreclosure suit (in which there was no other ground of jurisdiction than the fact that the said court in the said creditors' administration suit had assumed jurisdiction and possession of the property and assets of said railroad company for the purposes of its entire administration), as an independent suit; and the question of the jurisdiction of said Circuit Court in the said foreclosure suit to adjudge the validity of said bonds and to decree the foreclosure and sale of the property of said insolvent railroad company and the distribution of the proceeds thereof to the holders of said bonds, without making the holders of said preferred shares parties and without permitting but denying the right of this petitioner to be a party thereto or to defend the same, are questions of gravity and importance.

Your petitioner is advised that the decision of the said Circuit Court of Appeals is in conflict with Rule 48 of the Equity Rules established by this court; and that said decision is in conflict with the decision of this court in divers cases, upon questions of grave importance, viz., upon the questions of the power of the court to adjudge and bind the private property right of persons interested in the subject-matter of suit, in the absence of such persons and without permitting such persons to be heard.

That your petitioner presents herewith and makes a part of this petition a copy of the transcript of record of said cause in said Circuit Court of Appeals, including the transcript of record in said cause in the Circuit Court of

the United States upon which the said cause was heard and determined in said Circuit Court of Appeals.

And your petitioner begs to submit herewith a brief and argument in support of this his petition.

Wherefore your petitioner prays that this court issue a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify to this court the record of its proceedings in said cause.

DANA A. ROSE,
By JOHN S. MILLER,
His Solicitor and Counsel.

JOHN S. MILLER,
of Counsel.

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

John S. Miller, being duly sworn, says that he is the solicitor and of counsel for the petitioner above named; that he was solicitor and of counsel for the petitioner, Dana Rose, in the Circuit Court of the United States for the Western Division of the Northern District of Ohio, and in the United States Circuit Court of Appeals for the Sixth Circuit in the cause mentioned in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true.

JOHN S. MILLER.

Subscribed and sworn to before me, this tenth day of January, 1900.

ARTHUR A. BLISS,
Notary Public.

TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY *v.* CONTINENTAL TRUST COMPANY.

ROSE *v.* CONTINENTAL TRUST COMPANY.

PETITIONS FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 500, 501. Submitted January 22, 1900. — Decided January 29, 1900.

Clerks of the Circuit Court of Appeals, having prepared the records on which causes are heard therein for the printer, indexed, and supervised the printing of the same, and distributed the printed copies thereof, and been paid therefor, may certify one of such copies for use on applications to this court for certiorari.

The reproduction of transcripts, in manuscript or in print, under such circumstances, is not required.

THE statement of the case is in the opinion of the court.

Mr. James D. Springer, *Mr. F. Spiegelbery* and *Mr. John Ford* for the Toledo, St. Louis &c. Railroad Company.

Mr. John S. Miller for Rose.

Mr. E. C. Henderson, *Mr. Henry Crawford* and *Mr. Willard Parker Butler* for the Continental Trust Company.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

These petitions for certiorari were accompanied by a motion for an order dispensing with the authentication and certification by the clerk of the Circuit Court of Appeals for the Sixth Judicial Circuit of the transcript of the record of the Circuit Court of the United States for the Northern District of Ohio, on which the appeals mentioned in the petitions were heard and submitted to and decided by said Circuit Court of Appeals. The clerk of the Circuit Court of Appeals has certified the transcript of the record and proceedings in that court, "except the transcripts from the Circuit Court, and except

also the printed briefs of counsel filed in my office in said causes." It appears that the transcript of record from the Circuit Court was duly certified by the clerk of the Circuit Court, was filed in the Circuit Court of Appeals, and thereafter was printed under the supervision, direction and control of the clerk of the Circuit Court of Appeals under and pursuant to the rules of that court, and that after the decision of the cases there, which had been heard and decided on one record, petitioners requested the clerk to certify, for the purpose of these applications, the transcript so printed under his supervision without requiring petitioners to pay the entire cost of a reproduction of the same in manuscript, but that the clerk refused to make any deduction by reason of the premises, and insisted that he had no power or authority so to do.

Under the third subdivision of rule 37 of this court, where application is made for certiorari under section six of the judiciary act of March 3, 1891, it is provided that "a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant, as part of the application."

The table of fees and costs in the Circuit Court of Appeals, established by this court in pursuance of the act of Congress of February 19, 1897, 169 U. S. 740, provides that the clerks of the Circuit Courts of Appeals may charge, among other items, for:

Affixing a certificate and a seal to any paper.....	$1 00
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index.....	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing).....	20

The record in these cases having been prepared for the printer, indexed, the printing supervised, and copies thereof distributed by the clerk of the Circuit Court of Appeals, and the clerk having been paid therefor, we are of opinion that

Counsel for Roberts.

our rule would have been fully complied with by the certificate of that clerk to one of the printed copies which he had so prepared, indexed, supervised and distributed, and which he, therefore, knew was an accurate transcript of the record from the Circuit Court; and, as it is shown, and is not denied, that the printed copies furnished us are in fact correct copies of the Circuit Court record, we have treated them as if that record had been duly certified to us by the clerk of the Circuit Court of Appeals.

The applications for certiorari are *Denied.*